United States Court of Appeals

for the Second Circuit

APPENDIX

76-6094

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

NATIONAL LABOR RELATIONS BOARD,

Applicant-Appellee,

—against—

BIOPHYSICS SYSTEMS, INC.,

Respondent-Appellant.

and

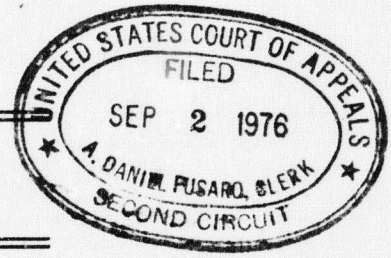
BIOPHYSICS SYSTEMS, INC.,

Respondent-Appellant,

—against—

JOHN S. IRVING, General Counsel of the National Labor Relations Board, and SIDNEY DANIELSON, Regional Director of the National Labor Relations Board, Region 2,

Additional Defendants-Appellees on the Counterclaims.



APPENDIX

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for Respondent-Appellant
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New York, New York 10022
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PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

Page

Docket Entries..... 1a

Index to the Record on Appeal..... 4a

Order to Show Cause to Comply with Subpoena..... 6a

Supporting Application for Order Requiring Obedience to Subpoena Duces Tecum..... 8a

Index to Exhibits Attached to Supporting Application.....14a

Exhibit a: Charge.....15a

Exhibit b: Complaint and Notice of Hearing.....16a

Exhibit C-1: Answer.....21a

Exhibit C-2: Amended Answer.....29a

Exhibits d(1-6): Orders Rescheduling or Postponing Hearing.....37a

Exhibit e: Subpoena Duces Tecum.....43a

Exhibit f: Postal Return Receipt for Subpoena Duces Tecum.....46a

Exhibit g(1-15): Respondent's Petition to Revoke Subpoena Duces Tecum, dated July 10, 1975, Supporting Documents, and Index Thereto.....47a

Exhibit h: General Counsel's statement in Opposition to Petition to Revoke Subpoena Duces Tecum and Request to Refer, dated July 15, 1975.....79a

Page

Exhibit i: Regional Director's Order Referring Petition to Revoke Subpoena to Chief Administrative Law Judge, dated July 16, 1975.....82a

Exhibit j: Order Denying Petition to Revoke Subpoena Duces Tecum, dated July 18, 1975.....83a

Exhibit k: Order on Demand for a List of Anticipated Witnesses, dated July 18, 1975.....84a

Exhibit l: Order on Demand for a Bill of Particulars, dated July 18, 1975.....85a

Exhibit m: Letter, dated July 29, 1975, from General Counsel to S. Kramer, Denying Respondent's Appeal of the Regional Director's Decision of June 20, 1975, Declining to Produce Certain Materials.....86a

Exhibit n: Letter, dated August 13, 1975 from S. Kramer to Regional Director Refusing to Obey Subpoena Duces Tecum.....87a(1)

Answer and Counterclaims.....88a

Notice of Motion for Order Dismissing Counterclaim or for Summary Judgment.....105a

Motion to Dismiss Counterclaim or for Summary Judgment and Annexed Statement of Facts.....107a

Affidavit of Amy Nora Gladstein.....114a

Affidavit of Lois D. Thompson in Opposition to Motion to Dismiss Counterclaims or, in the Alternative, for Summary Judgment.....118a

Exhibit 1: Appendix to the NLRB General Counsel's Guidelines for Processing Requests under the Freedom of Information Act.....125a

Exhibit 2: Regional Director's Reply to the Requests for Information of the Title Guarantee Company, dated July 3, 1975.....132a

Page

Exhibit 3: Letter of General Counsel dated August 1, 1975, Denying the Appeal of the Title Guarantee Co.....136a

Affidavit of Service by Mail of Affidavit of Lois D. Thompson.....139a

Opinion and Order of Judge Ward, dated April 12, 1976, Granting Motion for Summary Judgment.....140a

Stipulation as to the Submission to the Court of Indexes Annexed Thereto as Exhibits A-C.....148a

Notice of Appeal.....168a

R 18-304 SUBPOENAS ALL GOVERNMENT AGENCIES

DATE	PROCEEDINGS
12-18-75	USA,et al -v- GEOFFREY DAVEY-Filed Amendment to Memorandum Decision #43,481--Memorandum Decision in the above-entitled action dated 12-3-75 is amended as follows: Page 3,line 10-"Federal Rule of Civil Procedure 32" should read "Federal Rule of Civil Procedure 34". Add the indicated appearances at the end of the document. So Ordered. WERKER,J.
Dec.18-75	USA,et al -v- GEOFFREY DAVEY-Filed Judgment dated12-17-75--Ordered that Respondent,Geoffrey Davey,shall promptly,no more than 60 days after entry of this judgment,comply with IRS summons dated 1-27-75--Ordered that the aforestated duplicate tapes be delivered to the IRS upon the payment by the IRS of the reasonable expenses of duplication of such tapes. WERKER,J.
Dec. 29-75	USA -v- CHARLES BARNES--Filed Order dated 12-22-75--that the respondent be and hereby is adjudged in contempt of this Court--and that a Writ of Attachment directing that respondent be brought before the Court to answer for his wilful contempt of Court is hereby issued. METZNER,J.--Writ of Attachment issued 12-31-75.
Jan. 5-76	USA,et al -v- GRAYBAR ELECTRIC CO.,INC.,et al-Filed Order of Dismissal dated 12-30-75--The Order to show cause signed by Bord,J. on 11-21-75,ret. 12-9-75,and adjd. to 12-23-75,in Part I of this Court, is hereby withdrawn and dismissed. FRANKEL,J.
Jan. 7-76	USA -v- GEOFFREY DAVEY-Filed transcript of record of proceedings on 10-16-75 before Werker,J.
Jan.14-76	NATIONAL LABOR RELATIONS BOARD -v- BIOPHYSICS SYSTEMS,INC.-Filed Memorandum of Respondent in Opposition to Motions to Sever and for Immediate Enforcement of A Subpoena Duces Tecum.
Jan.14-76	NATIONAL LABOR RELATIONS BOARD -v- BIOPHYSICS SYSTEMS,INC.-Filed Affdvt. in Opposition to Motions to Sever and for Immediate Enforcement of Subpoena Duces Tecum.
Jan.16-76	[illegible]: USA -v- CHARLES BARNES-Filed Writ of Attachment with Marshal's return.
Jan.20-76	[illegible] -v- AMERICAN STANDARD,INC.,et al-Filed Respondent's Response to Petitioner's Interrogatories with Respect to Venue Motion by Arthur Co.(First Set).
[illegible]	-v- ARNOLD B. SCHUMAN-Filed Affdvt. and Order to Show Cause to compel respondent to fully comply with IRS Summons served upon him on 9-7-75--ret. 1-27-76,Rm.506, at 10:30 A.M. Bonsal,J.
[illegible]	-v- ARNOLD B. SCHUMAN-Filed Govt.'s Memorandum of Law.
[illegible]	[illegible] LABOR RELATIONS BOARD -v- BIOPHYSICS SYSTEMS,INC.-Filed notice of motion-ret. 1-27-76,at 10:30 A.M.
[illegible]	[illegible] LABOR RELATIONS BOARD -v- BIOPHYSICS SYSTEMS,INC.-Filed notice of Motion--ret. 1-27-76,10:30 A.M.,in Rm. 506.
[illegible]	[illegible] LABOR RELATIONS BOARD -v- BIOPHYSICS SYSTEMS,INC.-Filed [illegible] Respondent, Biophysics Systems,Inc. in Support of its Motion to Sever [illegible]
[illegible]	[illegible] -Filed [illegible] of Law, [illegible]
[illegible]	[illegible]

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SUBPOENAS ALL GOVERNMENT AGENCIES M 18-30

DATE	PROCEEDINGS
Mar. 5-76	USA,etc. -v- RADIO CENTER STATIONARY CO.,INC.,et al-Filed Affdvt. and Order to Show Cause--that respondents comply with IRS summons served upon them on 1-31-76---ret. 4-13-76,Rm.506 at 10:30 A.M.
Mar. 6-76	IN RE: APPLICATION OF MANUEL SMITH,THE MOVANT INTERVENOR,TO INTERVENE AND QUASH AN IRS SUMMONS SERVED UPON LANDAU AND CO.-Filed Endorsed Memorandum on Notice of Motion filed 3-23-76--Motion granted on default. It is SO ordered. LASKER,J.
Mar.12-76	NLRB -v- BIOPHYSICS SYSTEMS,INC.-Filed Endorsed memorandum on Application for Order Requiring Obedience to Subpoena Duces Tecum--Motion withdrawn. WARD,J.
Mar. 12-76	NLRB -v- BIOPHYSICS SYSTEMS,INC.-Filed Endorsed Memorandum on Notice of Motion filed 1-20-76--Motion granted in accordance with memorandum decision filed herewith. WARD,J.
Mar. 12-76	NLRB -v- BIOPHYSICS SYSTEMS,INC.-Filed Memorandum decision #44,215--the FOIA does not entitle Biophysics to disclosure of the material requested in its letter of 6-16-75.Accordingly,the NLRB's motion for summary judgment is granted and the counterclaims are dismissed. It is so ordered. WARD,J.
Mar. 19-76	NLRB -v- BIOPHYSICS SYSTEMS,INC.-Filed NLRB's Supplemental Memorandum in Support of Motion to Dismiss the Counterclaim,or,in the alternative,for Summary Judgment.
Apr. 26-76	USA -v- EVANGELOS MYTALAS-Filed Affdvt. and Order to Show Cause to compel respondent to fully testify and produce the records demanded in the IRS summons served upon him on 10-3-75 by the petitioner, Mark Zipkin--ret. 5-4-76,at 10:30 A.M. in Rm.506. LASKER,J.
Apr. 26-76	USA -v- EVANGELOS MYTALAS-Filed Govt.'s Memorandum of Law.
Apr. 26-76	USA -v- ANGELO PERCIANTE-Filed Affdvt. and Order to Show Cause that Respondent fully comply with IRS summons served upon him on 11-19-75. Ret. 5-4-76,at 10:30 A.M., in Rm.506. LASKER,J.
Apr. 26-76	USA -v- ANGELO PERCIANTE-Filed Govt.'s Memorandum of Law.
Apr. 26-76	USA -v- DOMINICK PALMIERI-Filed Affdvt. and Order to Show Cause compelling respondent to comply fully with IRS summons served upon him on 10-29-75--ret. 5-18-76,at 10:30 A.M.in RM. 506. BRIEANT,J.
Apr. 26-76	USA -v- DOMINICK PALMIERI-Filed Govt.'s Memorandum of Law.
Apr. 26-76	USA -v- LEVY ZALE-Filed Affdvt. and Order to Show Cause compelling Respondent to fully comply with IRS summons served upon him on 10-6-75--ret. 5-18-76,at 10:30 A.M. in Rm.506. BRIEANT,J.
Apr. 26-76	USA -v- LEVY ZALE-Filed Govt.'s Memorandum of Law.
Apr. 26-76	USA -v- EVANGELOS MYTALAS-Filed Endorsed Memorandum on Order to Show Cause filed 4-26-76--Being advised that the respondent has complied with the summons, the within motion is allowed to be withdrawn. So Ordered. WYATT,D.J.
May 7-76	USA -v- ANGELO PERCIANTE-Filed Endorsed Memorandum on Order to Show Cause filed on 4-26-76--Default noted in open Court. Submit Order. WYATT,D.J.
May 10-76	USA,et al -v- RADIO CENTER STATIONARY CO.,INC.,et al-Filed Affdvt. by HYMAN LANDAU submitted in opposition to petitioners' application for enforcement of the subpoena served upon him.
May 10-76	USA,et al -v- HYMAN LANDAU-Filed Answer by respondent.
May 13-76	USA,et al -v- RADIO CENTER STATIONARY CO.,INC.,et al-Filed Notice of Motion--ret. 5-18-76,at 10:30 A.M. in Rm.506.
May 17-76	USA,et al -v- RADIO CENTER STATIONARY CO.,INC,et al-Filed Answer by Respondents.
May 21-76	USA,et al -v- HYMAN LANDAU-Filed Notice of Motion--ret. 5-18-76, at 10:30 A.M. in Rm. 506.

SUBPOENAS — ALL GOVERNMENT AGENCIES — M 18-304

DATE	PROCEEDINGS
May 28-76	FTC -v- AMERICAN STANDARD -, ,et al-Filed Endorsed Memorandum on Order to Show Cause filed 3-6-75--This proceeding is dismissed as per the notice of dismissal endorsed by the Court this day. Weinfeld,J.
May 28-76	FTC -v- AMERICAN STANDARD,INC.,et al-Filed Endorsed Memorandum on Order to Show Cause filed 3-17-75--This Proceeding is dismissed as per the notice of dismissal endorsed by the Court this day. So Ordered. WEINFELD,J.
May 28-76	FTC -v- AMERICAN STANDARD,INC.,et al-Filed Endorsed Memorandum on Order to Show Cause filed 3-31-75--This proceeding is dismissed as per the Notice of Dismissal endorsed by the Court this day. So Ordered. WEINFELD,J.
May 28-76	FTC -v- AMERICAN STANDARD,INC.,et al-Filed Endorsed Memorandum on Order to Show Cause filed 2-21-75--This proceeding is dismissed as per the Notice of Dismissal endorsed by the Court this day. So Ordered. WEINFELD,J.
June 2-76	IN RE: APPLICATION TO ENFORCE AN ADMINISTRATIVE SUBPOENA DUCES TECUM OF THE SEC -v- LEON VERRICO-Filed Affdvt. and Order to Show Cause to enforce SEC Subpoena--ret. 6-8-76,at 10:30 A.M. in Rm.506. FAVIERI,J.
June 3-76	IN RE: APPLICATION TO ENFORCE AN ADMINISTRATIVE SUBPOENA DUCES TECUM OF THE SEC -v- LEON VERRICO-Filed Affdvt. of Service of Order to Show Cause to respondent.
June 3-76	IN RE: APPLICATION TO ENFORCE AN ADMINISTRATIVE SUBPOENA DUCES TECUM OF THE SEC -v- LEON VERRICO-Filed Applicant's Memorandum of Law in Support of its Application for Enforcement of an Administrative Subpoena Duces Tecum.
June 3-76	NLRB -v- JOSE VELEZ,et al-Filed Order to Show Cause with attached Affdvt. directing Respondents to appear before a duly-designated Administrative Law Judge of the Board And comply with subpoenas served on them.--ret. 6-15-76,at 10:30 AM,in Rm.506. Bricant,J.
June 3-76	NLRB -v- JOSE VELEZ,et al-Filed Application for Order Requiring Obedience to Subpoena Ad Testificandum submitted by NLRB.
June 3-76	NLRB -v- JOSE VELEZ,et al-Filed Applicant's Memorandum(NLRB).
June 4-76	USA -v- RICHARD H. WEISWASSER-Filed Endorsed Memorandum on Order to Show Cause filed 5-24-76--Motion granted. Order to be submitted on notice by Govt. See record of 6-4-76. FAVIERI,J.
June 9-76	IN RE: APPLICATION TO ENFORCE AN ADMINISTRATIVE SUBPOENA OF THE SEC -v- LEON VERRICO-Filed Endorsed Memorandum on Order to Show Cause filed 6-3-76--Motion to enforce the subpoena duces tecum is granted. The respondent Leon Verrico is directed to appear with the necessary documents at the offices of the S.E.C,26 Fed. Plaza,N.Y.,N.Y., Rm.1100 on 6-22-76 at 10:00 A.M. It is so ordered. Signed. GOETTEL,J.
June 11-76	NLRB -v- ATOMIC SYSTEMS,INC.-Filed Notice of Appeal to USCA for Second Circuit from the order dated 4-12-76 granting Appellee's motion for summary judgment,dismissing Respondent's counterclaim, denying Respondent's motion for a preliminary injunction. m/n: William Wachter,Acting Asst. Gen. Counsel for Special Litigation,1717 Pennsylvania Ave.,N.W.,Wash.,D.C. 20570; and Richard J. Bennett,Regional Atty.,Region 2,NLRB,26th Fl.-Fed. Bldg.,26 Fed. Plaza, N.Y.,N.Y. 10007.

(Continued on next)

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United States Court of Appeals
for the Second Circuit

NATIONAL LABOR RELATIONS BOARD

-against-

BIOPHYSICS SYSTEMS, INC.

United States Court
Southern District of
New York

Case No. 76-M18-304

Judge R.J. Ward

Docket No. T 6178

Index to the Record on Appeal		Documents
	Certified copy of the docket sheets	A-C
Jan. 7, 1976	Application for Order requiring obedience to Subpoena Duces Tecum; Memorandum endorsed 4/12, Ward, J.	1
Jan. 7, 1976	Answer and Counterclaim of Respondent	2
Jan. 9, 1976	Notice of Motion to sever by N.L.R.B.	3
Jan. 9, 1976	Memorandum in Support of Motion to Sever	4
Jan. 9, 1976	Order to Show Cause and Application to compel obedience to Subpoena	5
Jan. 9, 1976	Memorandum of Points & Authorities in Support of applic. to compel obedience to subpoena	6
Jan. 14, 1976	Aff. of Lois D. Thompson dated 1/6/76 of Respondent in Opp. to motions to sever & for enfor. of subp.	7
Jan. 14, 1976	Memorandum of Respond. in opposition to motions to sever & for enforc of subp.	8
Jan. 20, 1976	Notice of Motion to Dismiss counterclaims and for Summ. Judg. and memorandum in Support of said application; Memorandum endorsement, 4/12/76, Ward, J.	9
Jan. 22, 1976	Notice of mot. by Resp. for a Stay	10
Jan. 22, 1976	Memorandum of Resp. in Support of motion for a Stay.	11
Jan. 26, 1976	Aff. of Lois D. Thompson in Oppo. to motion to dismiss counterclaims/ summ. judg.	12
Jan. 26, 1976	Memorand. in oppos to motion to dismiss counter-claims/ summ. judg.	13
Jan. 27, 1976	Stipulation dated 1/15/76, subst. W.D. Morio as add'l dcft on counterclaim	14
Feb. 12, 1976	Opinion #14215, Ward, J. granting motion for summ. judg.	15
Mar. 19, 1976	Supplem. Memo. in Supp. of mot. to dismiss the counterclaims	16
Apr. 1, 1976	Notice of Appeal	17

Index to the Record on Appeal	Documents
Clerk's Certification of Docket Sheet	18

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Copy received by hand 1/7/76 by LDT

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NATIONAL LABDR RELATIONS BOARD,

Applicant

v.

BIOPHYSICS SYSTEMS, INC.

Respondent

----------x

Served
Received hand 1/7/76
Entered in Docket PC
Entered in Diary For 1/20/76
1/27/76

ORDER TO SHOW CAUSE TO COMPLY WITH SUBPOENA

The National Labor Relations Board, hereinafter called the Board, by its General Counsel, and by Edwin M. Bennett, Acting its Regional Attorney for Region 2, having filed its application for an order requiring respondent Biophysics Systems, Inc. to obey and comply with a certain subpoena duces tecum duly and properly served on said respondent as set forth in said application, and good cause appearing therefore,

IT IS ORDERED that respondent Biophysics Systems, Inc., appear and show cause, if any there be, at Room 506 United States Courthouse, Foley Square, New York, New York, on the 27th day of January, 1976, at 10:30 A.M., or as soon thereafter as counsel can be heard, why an order of this Court should not issue directing the respondent Biophysics Systems, Inc., to appear before a duly designated Administrative Law Judge of the Board, at such time and place as the Administrative Law Judge or the Regional Director for Region 2 of the Board, acting as agent of the Board shall designate, and there produce the books, papers, records, and other data described in the subpoena duces tecum served on respondent, and give testimony, in connection with the proceeding now pending before said Board pursuant to Section 10 of the National Labor Relations Act, as amended, (29 U.S.C. Sec. 151 et seq.); and

IT FURTHER IS ORDERED that if respondent files an answer to the allegations of said application with the Clerk of this Court, a copy thereof shall be served upon applicant at the offices of the Board located at 26 Federal Plaza, Room 3614, New York, New York, on or before the 20 day of January, 1976, and

IT FURTHER IS ORDERED that a copy of this order to show cause, and of the application upon which it is issued, shall be served by personal service or any officer or agent of said respondent on or before the 7th day of January 1976, by a representative designated by applicant, and that proof of such service be filed herein; and

IT FURTHER IS ORDERED that memoranda in support of, and in opposition to, the within application may be served and filed by the parties on or before the 20 day of January 1976

Done at New York, New York this 7 day of January 1976

S/ Dudley B. Bonsal
United States District Judge
(Pair - One)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----------x

NATIONAL LABOR RELATIONS BOARD

Applicant

v.

BIOPHYSICS SYSTEMS, INC.

Respondent

----------x

APPLICATION FOR ORDER REQUIRING OBEDIENCE TO SUBPOENA DUCES TECUM

The National Labor Relations Board, hereinafter referred to as the Board, an administrative agency of the Federal Government created pursuant to the National Labor Relations Act, as amended (29 U.S.C. Sec. 151 et seq), hereinafter referred to as the Act, by its General Counsel, and by Edwin P. Bennett, its Acting Regional Attorney, Region 2, respectfully applies to this honorable Court, pursuant to Section 11(2) of the Act, for an order requiring Biophysics Systems, Inc., hereinafter referred to as Biophysics, to obey a certain subpoena duces tecum, issued by the Board and duly served on it in the manner provided by law. In support of said application, upon information and belief, the Board respectfully shows as follows:

a. This Court has jurisdiction of the subject matter of the proceeding, and of the respondent, by virtue of Section 11(2) of the Act, in that the inquiry in aid of which the subpoena was issued was carried on within this judicial district, and that the respondent is a domestic corporation chartered under the laws of the United States and licensed to do business in the State of New York, maintaining an office for that purpose at Baldwin Place Road, Mahopac, New York.

b. Pursuant to the provisions of Section 6 of the Act, the Board has issued Rules and Regulations (Series 8, as amended, hereinafter referred to as the "Rules") governing the conduct of its operations, which Rules have been duly published in the Federal Register (24 F.R. 9095) as provided for in the Administrative Procedure Act (5 U.S.C. Sec. 552). This Court may take judicial notice of the said Rules by virtue of 44 U.S.C. Sec. 307.

c. Pursuant to the provisions of Section 10(b) of the Act, there is now pending before the Board an unfair labor practice proceeding, Biophysics Systems, Inc. (Local 1783, International Brotherhood of Electrical Workers) Case No. 2-CA-13562, wherein there has been filed and served a charge, a complaint and notice of hearing has issued, and an answer and amended answer have been filed, all in the manner and form required by law and by Sections 102.9, 102.10, 102.15 and 102.20 of the Board's Rules. Copies of the said charge, complaint and notice of hearing, answers, and orders rescheduling said hearing are annexed hereto and made a part hereof, designated exhibits a, b, c-1, c-2, d-1, d-2, d-3, and d-4, d-5, and d-6 respectively.

d. In relation to the proceeding described in paragraph c, above, the Board did cause to be issued, on July7, 1975, at the written request of a representative of the General Counsel, a subpoena duces tecum, directed to the respondent, and requiring said respondent to appear at a hearing before an Administrative Law Judge of the Board to be held on July 14, 1975, and on any adjourned, rescheduled, or continued date thereof, at 11 o'clock in the forenoon, in the hearing room of the Board located at 26 Federal Plaza, Room 3614, New York, New York 10007,(that hearing has been rescheduled for November 10, 1975) and to then and there give testimony and produce certain records and papers more fully described as follows:

1. A copy of the Biophysics Systems, Inc., personnel policies manual or booklet and such other documents, memoranda, or bulletins, which reflect the salary review and wage increase policies of Biophysics Systems, Inc., with respect to all full-time production, incoming inspection, shipping, receiving and stock employees of Biophysics Systems, Inc., employed at its Mahopac, New York plant, for calendar years 1973, 1974, and 1975.

2. The payroll records for calendar years 1972, 1973, and 1974 for all employees whose names appear on the eligibility list for the election conducted in Case No. 2-RC-16670 (a copy of said list is attached) as will indicate any or all of the following information:

   a. the date on which each of said employees was hired by Biophysics Systems, Inc.,

   b. the date or dates on which each of said employees received a salary or wage review,

   c. the date or dates on which each of said employees received an increase in wage rates,

   d. the date or dates on which each of said employees was denied a wage increase.

3. Copies of all written disciplinary warnings issued to employees of Biophysics Systems, Inc., for calendar years 1973, 1974, and 1975.

Said subpoena duces tecum was issued under the authority of, and in the manner and form provided for, in Section 11(1) of the Act and Section 102.31(a) of the Rules. A copy of the subpoena is attached hereto marked "exhibit e."

e. The subpoena described in paragraph d, above, was duly served on respondent Biophysics by addressing the original thereof and sending same by registered mail to Biophysics at the offices described in paragraph a, above, and receipt thereof on July 9, 1975, has been duly acknowledged, all in the manner and form provided for in Section 11(4) of the Act and Section 102.111 of the Rules. A photostatic copy of the post office receipt is attached hereto marked "exhibit f."

f. Pursuant to Section 11(1) of the Act and Section 102.31(b) of the Rules said respondent Biophysics did, on July 10, 1975, file with Sidney Danielson, Regional Director for Region 2 of the Board, a petition to revoke the subpoena duces tecum described in paragraph d, above. A copy of said petition and the documents submitted by respondent in support thereof are annexed hereto as "exhibit g (1-15)," "exhibit g-15" being an index to the documents contained in "exhibit g." (A copy of the Regional Director's Order Referring Respondent's Demand for a Bill of Particulars to the Chief Administrative Law Judge, which was inadvertently omitted by respondent from said supporting documents, is included therein as "exhibit g-14.")

g. On July 15, 1975, Counsel for the General Counsel filed with said Regional Director a statement in opposition to respondent's said petition to revoke said subpoena duces tecum, and requested that same be referred to the Chief Administrative Law Judge for ruling. A copy of said opposition and request for referral is annexed hereto as "exhibit h."

h. On July 16, 1975, the Regional Director referred respondent's petition to revoke and General Counsel's said statement in opposition to the Chief Administrative Law Judge for ruling. A copy of said order of referral is attached hereto as "exhibit i."

i. On July 18, 1975, Arthur Leff, the Administrative Law Judge designated to rule on said petition to revoke the subpoena duces tecum, denied same. A copy of the order denying said petition to revoke is annexed hereto as "exhibit j."

j. On July 13, 1975, the aforesaid Administrative Law Judge issued an Order On Demand for a List of Anticipated Witnesses and an Order on Demand for a Bill of Particulars, copies of which are annexed hereto as "exhibits k and l" respectively, in which respondents Demand for a List of Anticipated Witnesses (exhibit g-9) and respondent's Demand for a Bill of Particulars (exhibit g-12) were denied.

k. On July 29, 1975, the General Counsel of the Board denied respondent's appeal (exhibit g-8) from the Regional Director's June 20, 1975, refusal (exhibit g-7) to furnish to respondent certain information which respondent had requested on June 16, 1975, under inter alia, provisions of the Freedom of Information Act,5 U.S.C. Sec. 552 et seq. A copy of said denial is annexed hereto as "exhibit m."

l. On August 13, 1975, Respondent notified said Regional Director and Counsel for the General Counsel, by letter, that it would not comply with said subpoena duces tecum. A copy of said letter is annexed hereto as "exhibit n."

m. The refusal of respondent Biophysics to produce the required records in obedience to the subpoena duces tecum, which records are relevant and material to the issues in the proceeding before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act, and by thus impeding and continuing to impede the Board in the investigation of the matters before it, respondent has prevented and is preventing the Board from carrying out its duties and functions under the Act.

n. No previous application has been made for the relief requested herein.

WHEREFORE, the applicant, National Labor Relations Board, respectfully prays:

1. That an order issue forthwith directing the respondent Biophysics Systems, Inc., to appear before this court on a day certain to be fixed in said order, and that it show cause, if any there be, why an order should not issue directing it to appear before an Administrative Law Judge designated by the Board to take evidence in Case No. 2-CA-13562 pending before said Board, at such time and place as said Administrative Law Judge or the Regional Director for Region 2 of the Board, acting as agent of the Board may designate, and there

produce the records described in paragraph d, above, and to give testimony and answer any and all questions relevant and material to the matters under investigation and in question is said proceeding before the Board; and

2. That upon return of said order to show cause, an order issue out of this Court requiring respondent Biophysics Systems, Inc., to appear before said Administrative Law Judge at a time and place to be fixed by said Administrative Law Judge, or by the Regional Director for Region 2 of the Board, acting as agent of the Board, and there produce the records described in paragraph d, above, and give testimony and answer any and all questions relevant and material to the matters under investigation and in question in said proceeding before said Board; and

3. That applicant, National Labor Relations Board, have such other and further relief as may be deemed necessary and appropriate.

Dated: New York, New York

this day of

National Labor Relations Board

By: _____
John S. Irving
General Counsel

_____
Edwin H. Bennett
Acting Regional Attorney, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10007

Raymond P. Green,
Attorney

Alexander P. Rosenberg,
Attorney

National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10007
Telephone 264-0300

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

Edwin H. Bennett, being first duly sworn, deposes and says:

1. I am the Acting Regional Attorney, Region 2, of the National Labor Relations Board; that I have read the foregoing petition and know the contents thereof; that the statements therein made as upon personal knowledge are true and those made as upon information and belief I believe to be true.

2. That this application is made upon an Order to Show Cause rather than by Notice of Motion because respondent's contumacious conduct in refusing to produce records in a proceeding before the Board, has caused two postponements of said proceedings and thereby has caused unnecessary delay in such proceeding and further has and is thwarting the Board from carrying out its function as defined by law.

_____
Edwin H. Bennett

Subscribed and sworn to before me
this day of

_____
Arthur A. Herman
Notary Public State of New York
Qualified in Nassau County
No. 30-1769250
Term Expires March 30, 1977

INDEX TO EXHIBITS

EXHIBIT	DESCRIPTION
a	Charge
b	Complaint and Notice of Hearing
c-1	Answer
c-2	Amended Answer
d-1	Order, dated April 15, 1975, Rescheduling Hearing from May 5, to May 27, 1975.
d-2	Order, dated May 20, 1975, Rescheduling Hearing from May 27, to July 14, 1975.
d-3	Order, dated July 10, 1975, Rescheduling Hearing from July 14, to September 9, 1975.
d-4	Order, dated September 8, 1975, Rescheduling Hearing from September 9, to November 10, 1975.
d-5	Order, dated November 6, 1975, Postponing Hearing Indefinitely
d-6	Order, dated December 8, 1975, Rescheduling Hearing to February 10, 1975.
e	Subpoena duces tecum.
f	Postal return receipt for subpoena duces tecum
g(1-15)	Respondent's Petition to Revoke Subpoena Duces Tecum, supporting documents, dated July 10, 1975, and index thereto.
h	General Counsel's Statement in Opposition to Petition to Revoke and Request to Refer, dated July 15, 1975.
i	Regional Director's Order Referring Petition to Revoke and Opposition to Chief Administrative Law Judge, dated July 16, 1975.
j	Order Denying Petition to Revoke Subpoena Duces Tecum, dated July 18, 1975.
k	Order on Demand for List of Anticipated Witnesses, dated July 18, 1975.
l	Order on Demand for Bill of Particulars, dated July 18, 1975.
m	Letter, dated July 29, 1975, from General Counsel to S. Kramer, denying Respondent's appeal of the Regional Director's Decision of June 20, 1975, declining to produce certain materials.
n	Letter, dated August 13, 1975, from S. Kramer to Regional Director refusing to obey subpoena duces tecum.

FORM NLRB-501
(2-67)

Form Approved
Budget Bureau No. 64-R001.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 2-CA-13562

Date Filed 12/18/74

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Biophysics Systems, Inc.

b. Number of Workers Employed: 25

c. Address of Establishment (Street and number, city, State, and ZIP code): Baldwin Place Rd, Mahopac, NY 10541

d. Employer Representative to Contact: Mr. M. Friedman

e. Phone No.: (914) 628-7451

f. Type of Establishment (Factory, mine, wholesaler, etc.): Factory

g. Identify Principal Product or Service: Manufacturer of clinical and research equipment

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about October 29, 1974, the Employer has failed and refused to bargain with Local 1783, International Brotherhood of Electrical Workers, AFL-CIO and since that time and to the present has engaged in a course of conduct designed to dissipate the majority status of the charging Union.

Request is hereby made that an investigation be conducted pursuant to which an election held on December 12, 1974, amongst the Employers and Employees be vacated and set aside; that Board seek injunctive relief requiring the Employer to negotiate an agreement with the Union and that the Board impose sanctions on this Employer requiring them to affect retroactive benefits for the Employees involved.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Local 1783, International Brotherhood of Electrical Workers, AFL-CIO

4a. Address (Street and number, city, State, and ZIP code): 474 Mamaroneck Avenue, White Plains, N.Y. 10605

4b. Telephone No.: (914) 948-3771

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

International Brotherhood of Electrical Workers

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Herbert A. Dixon (Signature of representative or person filing charge) — Attorney (Title, if any)

Herbert A. Dixon

Address 30 East Hawthorne Avenue, Valley Stream, NY 11580 — (516) 561-1122 (Telephone number) — 12/17/74 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 891-604

EXHIBIT a

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BIOPHYSICS SYSTEMS, INC.

and CASE NO. 2-CA-13562

LOCAL 1783, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

COMPLAINT AND NOTICE OF HEARING

It having been charged by Local 1783, International Brotherhood of Electrical Workers, herein called Local 1783, that Biophysics Systems, Inc., herein called Biophysics, has engaged in, and is engaging, in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, Region 2, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The Charge in this proceeding was filed by Local 1783 on December 18, 1974, and served by registered mail upon Biophysics, on or about December 19, 1974.

2.(a) Biophysics is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

(b) At all times material herein, Biophysics has maintained its principal office and place of business at Baldwin Road, in the City of Mahopac and State of New York, where it is, and has been at all times material herein, engaged in the manufacture, sale and distribution of biomedical apparatus and related products.

(c) During the past fiscal year, which period is representative of its annual operations generally, Biophysics, in the course and conduct of its business operations, manufactured, sold and distributed at its Mahopac plant, products valued in excess of $250,000, of which products valued in excess of $50,000 were shipped from said plant in interstate commerce directly

EXHIBIT b

to states of the United States other than the state in which it is located.

3. Biophysics is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act.

4. Local 1783 is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5.(a) Joseph Silvestro is, and has been at all times material herein, an agent of Biophysics acting on its behalf, and a supervisor thereof within the meaning of Section 2(11) of the Act.

(b) Louis Karetsky and Mitchell Friedman are, and have been at all times material herein, the president and vice president, respectively, of Biophysics, acting on its behalf, and agents thereof.

6. All full-time production, incoming inspection, shipping, receiving and stock employees of Biophysics, employed at its Mahopac plant, exclusive of all office clerical employees, draftsmen, test technicians, testers, all employees in the engineering department and the research and development department, all sales, marketing, and field services employees, all professional employees, model makers and experimental machinists, purchasing agents and administrative employees, maintenance employees, watchmen-janitors, groundsmen, all casual employees and all irregular part-time employees and supervisors as defined in Section 2(11) of the Act including the production manager, production foremen, inspection manager, production control manager and designers constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

7. In or about October 1974, a majority of the employees of Biophysics, in the unit described above in paragraph 6, designated and selected Local 1783 as their representative for the purposes of collective bargaining with Biophysics and at all times since said date, Local 1783, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining.

8. On or about October 29, 1974, Local 1783 demanded that Biophysics recognize and bargain collectively with it as the exclusive collective bargaining representative of the employees of Biophysics in the unit described

above in paragraph 6.

9. On or about October 31, 1974, Biophysics, by letter signed by Mitchell Friedman, declined and refused to recognize and bargain collectively with Local 1783 as the exclusive collective bargaining representative of the employees of Biophysics in the unit described above in paragraph 6.

10. In or about the first week of November 1974 and the latter part of November 1974, the exact dates presently unknown, Biophysics by Mitchell Friedman, and Joseph Silvestro, at or in the vicinity of its premises, interrograted employees concerning their membership in and activities on behalf of Local 1783.

11. In or about the first week of November 1974, Biophysics, by Mitchell Friedman, at the Dutch Mill Restaurant on Route 202, threatened employees that Biophysics would cause work performed by unit employees to be transferred to Massachusetts if the union was selected as the collective bargaining representative of the employees in the unit described above in paragraph 6 and warned and directed its employees to refrain from remaining members of or giving support to Local 1783.

12. In or about November 1974, Biophysics at its premises, by Joseph Silvestro, offered, promised and granted to its employees wage increases, to induce them to refrain from becoming or remaining members of Local 1783, and to refrain from giving any assistance or support to it, and to induce them to abandon their membership in and activity on its behalf.

13. On or about November 29, 1974, Biophysics at its premises, by Joseph Silvestro, issued a disciplinary warning to an employee because of her membership in and activities on behalf of Local 1783.

14. On or about November 27, 1974 and December 10, 1974 and on various other days the exact dates presently unknown during the month of November 1974, Biophysics, by Mitchell Friedman and Louis Kametsky, threatened its employees that the work performed by them would be transferred to Massachusetts if the employees selected Local 1783 as their collective bargaining representative.

15.(a) Biophysics engaged in the conduct described above in paragraphs 10 through 14 in order to undermine the Union and to destroy its majority status among the employees in the unit described above in paragraph 6.

(b) By the acts described above in paragraphs 10 through 14 Biophysics engaged in conduct which precluded the holding of a fair election

among the employees in the unit described above in paragraph 6.

c) The unfair labor practices set forth in paragraphs 10 through 14 are so serious and substantial in character and effect so as to warrant the entry of a remedial order requiring Biophysics to recognize and bargain with the Union as the exclusive collective bargaining representative of the employees in the unit described above in paragraph 6.

15. By the acts described above in paragraphs 10 through 14 and by each of said acts, Biophysics interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

17. The acts of Biophysics described above in paragraphs 10 through 14, occurring in connection with the operations of Biophysics described above in paragraphs 2 and 3, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 5th day of May 1975, at 11:00 a.m., at 26 Federal Plaza, Room 3614, in the City and State of New York, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the Regional Director, Region 2, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within ten (10) days from the service thereof, and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board. Immediately upon the filing ot its answer, Respondent shall serve a copy thereof on each of the other parties.

Form NLRB-4668, Statement of Standard Procedure in Formal Hearings

Held Before the National Labor Relations Board in Unfair Labor Practice Cases is attached.

Dated at New York, New York this 25th day of March 1975.

Sidney Danielson

Sidney Danielson, Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BIOPHYSICS SYSTEMS, INC.	:	
and	:	
LOCAL 1783, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS	:	ANSWER Case No. 2-CA-13562

Respondent, Biophysics Systems, Inc. ("Respondent"), by its attorneys, Proskauer Rose Goetz & Mendelsohn, alleges as its answer to the Complaint:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint, except admits that Respondent received, by registered mail, a charge filed by Local 1783, IBEW, and refers to that charge for all its terms and conditions.

2. Admits the allegations contained in paragraphs 2 and 3.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4.

4. Denies the allegations contained in paragraph 5(a), except admits that Joseph Silvestro is in the employ of Respondent and is a supervisor within the meaning of Section 2(11) of the National Labor Relations Act, as amended.

5. Denies the allegations contained in paragraph 5(b), except admits that Mitchell Friedman is Respondent's

Vice-President and that Louis Kametsky was Respondent's President prior to November 4, 1974, and Chairman of its Board of Directors thereafter.

6. Denies the allegations contained in paragraph 6, except admits that on or about November 15, 1974, Respondent signed a Stipulation for Certification by a Consent Election, which stipulation included a description of the employees entitled to vote in the election in substance as described in paragraph 6 of the Complaint.

7. Denies the allegations contained in paragraph 7.

8. Denies the allegations contained in paragraph 8, except admits that Respondent received a letter from the Union on or about October 29, 1974, attached hereto as Exhibit 1.

9. Denies the allegations contained in paragraph 9, except admits that Respondent sent a letter to the Union on or about October 31, 1974, attached hereto as Exhibit 2.

10. Denies the allegations contained in paragraphs 10, 11, 12, 13, 14, 15(a), 15(b), 16 and 17.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

11. On or about December 12, 1974, the Regional Director for the Second Region of the National Labor Relations Board conducted a representation election among Respondent's employees described in paragraph 6 of the Complaint, wherein 24 employees cast secret ballots, the results of which were as follows: 16 voted for No Union, 6 chose Local 1783, and 2 ballots were challenged.

12. The Regional Director has, at all times since then, wrongfully failed and refused to certify the results of the election, which was in all respects valid.

13. By reason of the foregoing, this Complaint should be dismissed.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

14. On information and belief, the authorization cards obtained by Local 1783 both prior to and after the filing of its Petition for a representation election were secured in whole or in part through the solicitation, and by virtue of the support, of certain persons in the employ of Respondent who are supervisors within the meaning of Section 2(11) of the Act, including but not limited to one Alexander Gardoni.

15. As a result of these actions, such showing of interest which Local 1783 may have had among Respondent's employees both prior to and after the representation election was tainted by the presence of such supervisory solicitation and support, and was, therefore, invalid and without legal effect herein.

16. By reason of the foregoing, this Complaint should be dismissed.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

17. On information and belief, the authorization cards obtained by Local 1783 both prior to and after the filing of its Petition for a representation election were

secured in whole or in part by material misrepresentations of fact by that labor organization.

18. As a result of these material misrepresentations of fact, any showing of interest which Local 1783 may have had among Respondent's employees both prior to and after the filing of the petition was invalid and without legal effect herein.

19. By reason of the foregoing, this Complaint should be dismissed.

WHEREFORE, Respondent demands that the Complaint be dismissed.

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for Biophysics Systems, Inc.

By Saul G. Kramer
Saul G. Kramer
300 Park Avenue
New York, N.Y. 10022

Dated: New York, New York
April 4, 1975.

Exhibit 1

Local 1783, International Brotherhood of Electrical Workers

470 MAMARONECK AVENUE
White Plains 8-3771
WHITE PLAINS, N. Y. 10605
ROBERT GREENE, President
J. RAYMOND McGOVERN, General Counsel

Members: New York State Federation of Labor
Westchester County Federation of Labor
New York State Association of Electrical Workers

October 29, 1974

Bio Physics Systems, Inc.
Baldwin Place Road
Mahopac, New York 10541

Attention: President

Gentlemen:

Please to take notice that this Union represents the majority of your employees engaged in production, drafting, maintenance and shipping, all employed at the plant on Baldwin Place Road in Mahopac, New York.

We are prepared to submit proof of our representation to a neutral party if you so desire.

We further serve notice that we are prepared to commence bargaining for our members in all matters relating to wages, hours and conditions of employment at once. The writer will contact you within the next day or two in order to make arrangements for the commencement of negotiations.

We further suggest that you do not allow any recriminatory or coercive action against our members, so that we can proceed to negotiations in a peaceful manner.

Very truly yours,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1783

Robert Greene

Robert Greene
President

RG:cw
Certified mail
Return receipt requested

Exhibit 2

B. C. C. Harold Goldsmith

October 31, 1974

Mr. Robert Greene, President
International Brotherhood of
Electrical Workers Local 1703
470 Mamaroneck Avenue
White Plains, New York 10605

Dear Mr. Greene:

This letter is in response to your letter of October 29, 1974. Our Company declines to recognize your organization as requested in your letter. As you know, the National Labor Relations Board conducts secret ballot elections to resolve questions concerning representation.

Should your organization file a petition with the Board, we will participate before that body so that an election may be conducted.

Very truly yours,

Mitchell Friedman

MF:rp

C.C. Saul Kramer
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BIOPHYSICS SYSTEMS, INC.	:	AMENDED ANSWER
and	:	
LOCAL 1783, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS	:	Case No. 2-CA-13562

Respondent, Biophysics Systems, Inc. ("Respondent"), by its attorneys, Proskauer Rose Goetz & Mendelsohn, alleges as its answer to the Complaint:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint, except admits that Respondent received, by registered mail, a charge filed by Local 1783, IBEW, and refers to that charge for all its terms and conditions.

2. Admits the allegations contained in paragraphs 2 and 3.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4.

4. Denies the allegations contained in paragraph 5(a), except admits that Joseph Silvestro is in the employ of Respondent and is a supervisor within the meaning of Section 2(11) of the National Labor Relations Act, as amended.

EXHIBIT G-1

5. Denies the allegations contained in paragraph 5(b), except admits that Mitchell Friedman is Respondent's Vice-President and that Louis Kamentsky was Respondent's President prior to November 4, 1974, and Chairman of its Board of Directors thereafter.

6. Denies the allegations contained in paragraph 6, except admits that on or about November 15, 1974, Respondent signed a Stipulation for Certification by a Consent Election, which stipulation included a description of the employees entitled to vote in the election in substance as described in paragraph 6 of the Complaint.

7. Denies the allegations contained in paragraph 7.

8. Denies the allegations contained in paragraph 8, except admits that Respondent received a letter from the Union on or about October 29, 1974, attached hereto as Exhibit 1.

9. Denies the allegations contained in paragraph 9, except admits that Respondent sent a letter to the Union on or about October 31, 1974, attached hereto as Exhibit 2.

10. Denies the allegations contained in paragraphs 10, 11, 12, 13, 14, 15(a), 15(b), 15(c), 16 and 17.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

11. On or about December 12, 1974, the Regional Director for the Second Region of the National Labor Relations Board conducted a representation election among Respondent's employees described in paragraph 6 of the

Complaint, wherein 24 employees cast secret ballots, the results of which were as follows: 16 voted for No Union, 6 chose Local 1783, and 2 ballots were challenged.

12. The Regional Director has, at all times since then, wrongfully failed and refused to certify the results of the election, which was in all respects valid.

13. By reason of the foregoing, this Complaint should be dismissed.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

14. On information and belief, the authorization cards obtained by Local 1783 both prior to and after the filing of its Petition for a representation election were secured in whole or in part through the solicitation, and by virtue of the support, of certain persons in the employ of Respondent who are supervisors within the meaning of Section 2(11) of the Act, including but not limited to one [illegible]ander Gardoni.

15. As a result of these actions, such showing of interest which Local 1783 may have had among Respondent's employees both prior to and after the representation election was tainted by the presence of such supervisory solicitation and support, and was, therefore, invalid and without legal effect herein.

16. By reason of the foregoing, this Complaint should be dismissed.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

17. On information and belief, the authorization cards obtained by Local 1783 both prior to and after the filing of its Petition for a representation election were secured in whole or in part by material misrepresentations of fact by that labor organization.

18. As a result of these material misrepresentations of fact, any showing of interest which Local 1783 may have had among Respondent's employees both prior to and after the filing of the Petition was invalid and without legal effect herein.

19. By reason of the foregoing, this Complaint should be dismissed.

WHEREFORE, Respondent demands that the Complaint be dismissed.

PROSKAUER ROSE GOETZ & MENDELSO
Attorneys for Biophysics System Inc.
300 Park Avenue
New York, New York 10022

By Saul G. Kramer
Saul G. Kramer

Dated: New York, New York
June 19, 1975.

Exhibit 1

Local 1783, International Brotherhood of Electrical Workers

470 MAMARONECK AVENUE
White Plains 8-3771
WHITE PLAINS, N. Y. 10605
ROBERT GREENE, President
J. RAYMOND McGOVERN, General Counsel

Member: New York State Federation of Labor
Westchester County Federation of Labor
New York State Association of Electrical Workers

October 29, 1974

Bio Physics Systems, Inc.
Baldwin Place Road
Mahopac, New York 10541

Attention: President

Gentlemen:

Please to take notice that this Union represents the majority of your employees engaged in production, drafting, maintenance and shipping, all employed at the plant on Baldwin Place Road in Mahopac, New York.

We are prepared to submit proof of our representation to a neutral party if you so desire.

We further serve notice that we are prepared to commence bargaining for our members in all matters relating to wages, hours and conditions of employment at once. The writer will contact you within the next day or two in order to make arrangements for the commencement of negotiations.

We further suggest that you do not allow any recriminatory or coercive action against our members, so that we can proceed to negotiations in a peaceful manner.

Very truly yours,

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 1783

Robert Greene

Robert Greene
President

RG:rew
Certified mail
Return receipt requested

Exhibit 2

B. C. C. Harold Goldsmith

October 31, 1974

Mr. Robert Greene, President
International Brotherhood of
Electrical Workers Local 1703
470 Mamaroneck Avenue
White Plains, New York 10605

Dear Mr. Greene:

This letter is in response to your letter of October 29, 1974. Our Company declines to recognize your organization as requested in your letter. As you know, the National Labor Relations Board conducts secret ballot elections to resolve questions concerning representation.

Should your organization file a petition with the Board, we will participate before that body so that an election may be conducted.

Very truly yours,

Mitchell Friedman

MF:ap

C.C. Saul Kramer
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

BEST COPY AVAILABLE

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BIOPHYSICS SYSTEMS, INC.

AND

LOCAL 1783, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Case No. 2-CA-13562

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from May 5 to May 27, 1975 at 11:00 a.m., at 26 Federal Plaza, Room 3614, N.Y.C. 10007.

DATED at New York, New York this 15th day of April , 1975.

Winfred D. Morris

Acting Regional Director, Region 2
National Labor Relations Board.

GPO 860-655

EXHIBIT d-1

FORM NLRB-[illegible]
[illegible]

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BIOPHYSICS SYSTEMS, INC. AND LOCAL 1783, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS	Case No. 2-CA-13562

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from May 27, 1975 to July 14, 1975 at 11:00 a.m., at 26 Federal Plaza, Room 3614, N.Y.C. 10007.

DATED at New York, N.Y. this 20th day of May, 19 75.

Sidney Dunielson

Regional Director, Region 2
National Labor Relations Board.

GPO 850-655

EXHIBIT d-2

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BIOPHYSICS SYSTEMS, INC.

AND

LOCAL 1783, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Case No. 2-CA-13562

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from July 14 to September 9, 1975 at 11:00 a.m., at 26 Federal Plaza, Room 3614, N.Y.C. 10007

DATED at New York, N.Y. this 10th day of July , 1975.

Audrey Ramsbeck

Regional Director, Region 2
National Labor Relations Board.

GPO 860-655

EXHIBIT d-3

FORM NLRB-359
(5-54)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BIOPHYSICS SYSTEMS, INC.

AND

LOCAL 1733, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS

Case No. 2-CA-13562

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is **rescheduled** from *September 8, 1975 to November 10, 1975 at 11:00 a.m., 26 Federal Plaza, Room 3614, N.Y.C. 10007.*

DATED at *New York, N.Y.* **this** *8th* **day of** *September* **, 1975.**

Sidney Dansker

Regional Director, *Region 2*
National Labor Relations Board.

GPO 860-655

EXHIBIT d-4

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BIOPHYSICS SYSTEMS, INC.

AND

CASE NO. 2-CA-13562

LOCAL 1783, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS

ORDER POSTPONING HEARING

IT HEREBY IS ORDERED that the hearing in the above-entitled matter scheduled for November 10, 1975 at 11:00 a.m., at 26 Federal Plaza, Room 3614, New York, New York be, and the same hereby is, postponed indefinitely.

Dated at New York, New York this 6th day of November 1975.

Sidney Danielson

Sidney Danielson, Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

EXHIBIT d-5

FORM NLRB-39
(5-54)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BIOPHYSICS SYSTEMS, INC.

AND

LOCAL 1733, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS

Case No. 2-CA-13562

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from *P.P. Indefinitely* to *February 10, 1976 at 11:00 a.m., 26 Federal Plaza, Room 3614, N.Y.C.*

DATED at *New York, N.Y.* this *8th* day of *December*, 19*75*.

Regional Director, *Region 2*
National Labor Relations Board.

GPO 860-655

EXHIBIT d-6

Form NLRB-31
(7-74)

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To BIOPHYSICS SYSTEMS, INC.
Baldwin Place Road
Mahopac, New York 10541

Request therefor having been duly made by Alexander P. Rosenberg, Counsel for the General Counsel of the National Labor Relations Board
whose address is 26 Federal Plaza, Room 3614, New York, New York 10007
Telephone: (212) 264-0323
YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge *of the National Labor Relations Board,*
at 26 Federal Plaza, Room 3614
in the City of New York
on the 14th *day of* July , 1975 , *at* 11 *o'clock* a. m.
of that day to testify in the Matter of BIOPHYSICS SYSTEMS, INC., Case No. 2-CA-13562
and on any adjourned, rescheduled, or continued date thereof,

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

See ATTACHMENT A

B- 154628

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

Issued at New York, New York
this 7th *day of* July , 1975

NOTICE TO WITNESS.—Witness fees for attendance, subsistence, and mileage, under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

EXHIBIT e

ATTACHMENT A

1. A copy of the Biophysics Systems, Inc., personnel policies manual or booklet and such other documents, memoranda, or bulletins, which reflect the salary review and wage increase policies of Biophysics Systems, Inc., with respect to all full-time production, incoming inspection, shipping, receiving and stock employees of Biophysics Systems, Inc., employed at its Mahopac, New York plant, for calendar years 1973, 1974, and 1975.

2. The payroll records for calendar years 1972, 1973, and 1974 for all employees whose names appear on the eligibility list for the election conducted in Case No. 2-RC-16670 (a copy of said list is attached) as will indicate any or all of the following information:

a. the date on which each of said employees was hired by Biophysics Systems, Inc.,

b. the date or dates on which each of said employees received a salary or wage review,

c. the date or dates on which each of said employees received an increase in wage rates,

d. the date or dates on which each of said employees was denied a wage increase.

3. Copies of all written disciplinary warnings issued to employees of Biophysics Systems, Inc., for calendar years 1972, 1973, 1974, and 1975.

ELIGIBILITY LIST

BIOPHYSICS SYTEMS, INC.
Case No. 2-RC-16670

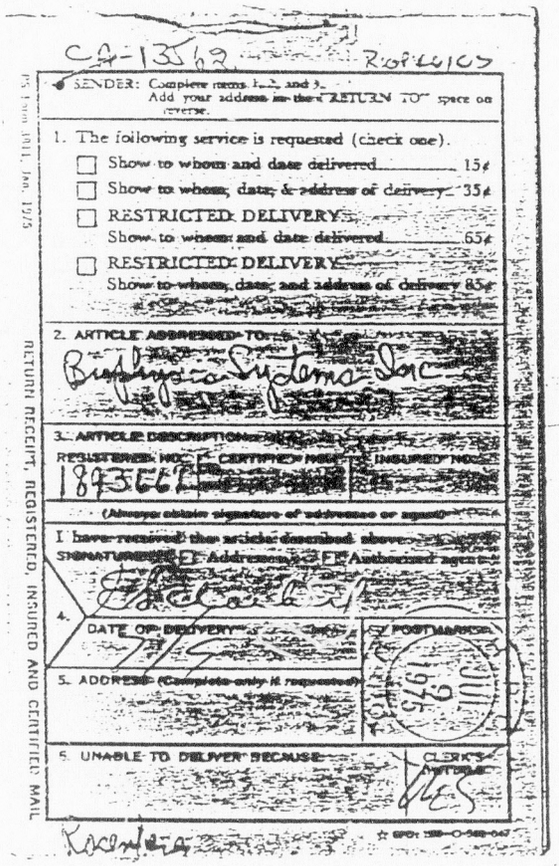
Mr. Alex Gardoni
Mr. Paul Kennedy
Mr. Steven Rotta
Mr. Herbert Day
Mr. Raynard E. Fiorino

Mr. Karl Christofori
Mr. Brian R. McHugh
Mr. William Zacotinsky
Mrs. Catherine Darby
Mrs. Joan Kessel

Mr. Thomas Cooper
Ms. Jo Ann Marchigiani
Mrs. Florence Lockwood
Mrs. Mary McCallum
Mrs. Stella Nardi

Mrs. Rita Swack
Ms. Kathy M. Benedetto
Mrs. Helen Condon
Mrs. Arlene Horne
Mr. Malcolm McaMillan

Mr. Raymond Maloney
Mr. Jeffrey Kover
Mr. James Odell
Mr. John McGinness



CA-1359 2! Rich Welch

SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

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- ☐ RESTRICTED DELIVERY
  Show to whom and date delivered ____ 65¢
- ☐ RESTRICTED DELIVERY
  Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
Biophysica Systems Inc

3. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. | INSURED NO.
189366

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. DATE OF DELIVERY: 7 9
POSTMARK: JUN 6 1975

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:
CLERK'S INITIALS

Rec'd 6-9

PS Form 3811, Jan. 1975

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

☆ GPO: 1975—O-569-047

EXHIBIT f

BEST COPY AVAILABLE

INDEX TO RESPONDENT'S PETITION TO REVOKE SUBPOENA DUCES TECUM AND DOCUMENTS SUBMITTED IN SUPPORT THEROF - EXHIBIT g-1 THROUGH g-15

EXHIBIT	DESCRIPTION
g-1	Respondent's Petition to Revoke Subpoena Duces Tecum, dated July 10, 1975.
g-2	Letter, dated July 7, 1975, from A. Rosenberg to S. Kramer re: issuance of subpoenas.
g-3	Subpoena No. A-489575, to Mitchell Friedman, dated July 7, 1975.
g-4	Subpoena No. A-489576, to Joseph Silvestro, dated July 7, 1975.
g-5	Subpoena duces tecum No. B-154628, to Biophysics, Systems, Inc., dated July 7, 1975.
g-6	Letter, dated June 16, 1975, from S. Kramer to A. Rosenberg and Regional Director, requesting affidavits, etc.
g-7	Letter, dated June 20, 1975, from Regional Director to S. Kramer declining to produce materials requested in g-6 above.
g-8	Letter, dated July 2, 1975, from S. Kramer to General Counsel, appealing Regional Director's determination in g-7 above.
g-9	Respondent's demand to General Counsel for List of Anticipated Witnesses, dated June 13, 1975.
g-10	General Counsel's Opposition to Demand for List of Anticipated Witnesses, dated July 2, 1975.
g-11	Regional Director's Order Referring Demand for List of Anticipated Witnesses (g-9 above) and General Counsel's Opposition (g-10 above) to Chief Administrative Law Judge, dated July 3, 1975.
g-12	Respondent's Demand to General Counsel for Bill of Particulars, dated June 13, 1975.
g-13	General Counsel's Response in Part and Opposition in Part to Demand for Bill of Particulars, dated July 2, 1975.
g-14	Regional Director's Order Referring Demand for Bill of Particulars (g-12 above) and General Counsel's Response and Opposition (g-13 above) to Chief Administrative Law Judge, dated July 3, 1975.
g-15	Index to items contained in Exhibits g-1 through g-15.

PROSKAUER ROSE GOETZ & MENDELSOHN
300 PARK AVENUE
NEW YORK, N.Y. 10022
TELEPHONE: (212) 593-9000
WRITER'S DIRECT DIAL NUMBER
593-9442

ALFRED L. ROSE
WALTER MENDELSOHN
ALFRED APPEL
WILBUR H. FRIEDMAN
CHARLES LOOKER
HOWARD LICHTENSTEIN
JAMES J. FUID
GEORGE M. SHAPIRO
GERALD SILBERT
WILLIAM P. HIGGINS, JR.
EDWARD SILVER
PHILIP J. HIRSCH
JACOB IMBERMAN
ROBERT DILLOF
GEORGE O. GALLANTZ
ROBERT J. LEVINSOHN
ANDREW D. HEINEMAN
BERNARD GOLD
RUTH G. SCHAPIRO
KLAUS EPPLER
HOWARD A. SHAPIRO
MARTIN J. OPPENHEIMER
ALAN S. ROSENBERG
LARRY M. LAVINSKY
STEPHEN R. KAYE
STANLEY KOMAROFF
IRA H. LUSTGARTEN
MARVIN DICKER
SAUL G. KRAMER
ROBERT M. KAUFMAN
RONALD S. SCHACHT
MORTON M. MANEKER
ARON B. KATZ
JEROLD ZIESELMAN
DAVID I. GOLDBLATT
YALE H. GELLMAN
ARNOLD J. LEVINE
HOWARD N. LEPROWITZ
BERNARD TANNENBAUM
HARVEY R. BENJAMIN
ALAN S. JAFFE
DAVID J. STERN
STEVEN J. STEIN
MICHAEL A. CARDOZO
L. ROBERT BATTERMAN
HOWARD L. GANZ
PAUL R. EPSTEIN
LAWRENCE J. ROTHENBERG

WILLIAM R. ROSE
(1875-1931)
JOSEPH M. PROSKAUER
(1930-1971)
NORMAN S. GOETZ
(1925-1972)

CABLE: ROPUT
TELEX: ITT 421178
WU 125352

July 10, 1975

Sidney Danielson, Esq.
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

Re: Biophysics Systems, Inc.
Case No. 2-CA-13562

Dear Mr. Danielson:

Reference is made to a letter from Counsel for the General Counsel, dated July 7, 1975, and attached hereto, enclosing copies of a subpoena duces tecum served upon Biophysics Systems, Inc., demanding various records pertaining to its employees, as well as two subpoenas ad testificandum served upon Mitchell Friedman and Joseph Silvestro, employees of Biophysics. The records sought by Counsel for the General Counsel in the subpoena duces tecum will apparently be used in preparation for the upcoming hearing in the above-referenced unfair labor practice case.

Respondent hereby informs you that it must respectfully decline to comply with the subpoena duces tecum for the reasons set forth below, and requests that it be revoked under Section 102.31(b) of the NLRB's Rules and Regulations.

The subpoenas were served shortly after the Regional Director and Counsel for the General Counsel completely rejected respondent's legitimate request for the affidavits and/or statements of Biophysics employees who may be called to testify during the hearing in this matter; any authorization cards signed by Biophysics employees that were solicited by representatives of Local 1783; and any documents in the government's possession which may tend to show

EXHIBIT g-1

that respondent did not commit the unfair labor practices alleged in the complaint. In addition, Counsel for the General Counsel has refused to give respondent a list of witnesses who may be called to testify, and has only partially responded to respondent's valid request for a bill of particulars to the complaint. Copies of each of respondent's requests, the responses of the Regional Director and Counsel for the General Counsel and respondent's appeal of the refusal of the Regional Director and Counsel for the General Counsel to comply with its documentary requests are attached hereto. These papers are incorporated herein as part of respondent's motion to revoke the subpoena duces tecum. All the documents and information sought by respondent would be used to prepare its defense, just as the documents subpoenaed by Counsel for the General Counsel would be used to prepare and prosecute his case.

Despite the rejection of respondent's attempts to gain limited discovery in order to protect its constitutional and statutory rights, Counsel for the General Counsel now demands that respondent furnish a multitude of documents, including (i) a "personnel policies manual or booklet" for the years 1973 through 1975; (ii) payroll records for those employees who were eligible to vote in the election for the years 1972 through 1974; and (iii) all written disciplinary warnings issued to any Biophysics employees during the years 1972 through 1975. Such a subpoena is clearly unreasonable in the circumstances of this proceeding.

It is obvious that the documents sought here are irrelevant and immaterial to the resolution of the unfair labor practices alleged in the complaint. Moreover, the subpoena is overly broad, burdensome and oppressive in that it seeks in part to obtain records concerning all Biophysics employees, and all the records sought go back a minimum of three years.

Respondent also believes that Counsel for the General Counsel should not be permitted to go on a "fishing expedition" through respondent's records in an attempt to gather information adverse to its defenses, while at the same time denying respondent the limited discovery that it has requested. The refusal of both the Regional Director and Counsel for the General Counsel to allow respondent access to those materials in their files which may provide exculpatory evidence in respondent's favor ignores both the strictly limited exceptions to disclosure found in the Freedom of Information Act and respondent's statutory and constitutional right of due process to be made aware of all such evidence in the government's possession.

PRG&M

Until the Regional Director and Counsel for the General Counsel reverse their inconsistent and prejudicial positions in this matter, respondent must decline to surrender the documents subpoenaed without receiving a corresponding right to view similar documents that it has requested from the government. Respondent, therefore, requests that the Regional Director revoke the subpoena issued in this proceeding.

Sincerely yours,

Saul G. Kramer

Saul G. Kramer

SGK:dsl
HAND DELIVERY

cc: Alexander P. Rosenberg, Esq.

NATIONAL LABOR RELATIONS BOARD
REGION 2
Federal Building, Room 3614, 26 Federal Plaza
New York, New York 10007
Telephone 264-0300

July 7, 1975

Saul G. Kramer, Esquire
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

Re: Biophysics Systems, Inc.
Case No. 2-CA-13562

Dear Mr. Kramer,

For your convenience I have enclosed copies of subpoenas which were served on this date by registered mail on representatives of Biophysics Systems, Inc. Should you have any questions, please feel free to call me at 264-0323.

Very truly yours,

Alexander P. Rosenberg by F.F.

Alexander P. Rosenberg
Attorney

Enc.

EXHIBIT g-2

NLRB-32
(2-73)

SUBPOENA

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Mr. Mitchell Friedman
c/o Biophysics Systems, Inc.
Baldwin Place Road
Mahopac, New York 10541

Request therefor having been duly made by Alexander P. Rosenberg, Counsel for the General Counsel of the National Labor Relations Board

whose address is 25 Federal Plaza (Street) New York (City) New York (State) 10007

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR before an Administrative Law Judge *of the National Labor Relations Board, at* 26 Federal Plaza, Room 3614

in the City of New York

on the 14th *day of* July, 1975, *at* 11 *o'clock* a. m. and on any adjourned, rescheduled, or continued date thereof, *of that day/to testify in the Matter of*

BIOPHYSICS SYSTEMS, INC.

Case No. 2-CA-13562

A- 489575

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

Issued at New York, New York

this 7th *day of* July, 19 75

Betty Southard Murphy

NOTICE TO WITNESS.—Witness fees for attendance, subsistence, and mileage, under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

EXHIBIT g-3

NLRB-32
(2-73)

SUBPOENA

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Mr. Joseph A. Silvestro
c/o Biophysics Systems, Inc.
Baldwin Place Road
Mahopac, New York 10541

Request therefor having been duly made by Alexander P. Rosenberg, Counse for the General Counsel of the National Labor Relations Board

whose address is 26 Federal Plaza (Street) New York (City) New York 10007 (State)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR before an Administrative Law Judge *of the National Labor Relations Board,*

at 26 Federal Plaza, Room 3614

in the City of New York

on the 14th *day of* July, *1975, at* 11 *o'clock* a m.
and on any adjourned, rescheduled, or continued date thereof,
of that day/to testify in the Matter of

BIOPHYSICS SYSTEMS, INC.

Case No. 2-CA-13562

A- 489576

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

Issued at New York, New York

this 7th *day of* July, *1975*

NOTICE TO WITNESS.—Witness fees for attendance, subsistence, and mileage, under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board should submit this subpoena with the voucher when claiming reimbursement.

EXHIBIT G-4

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To BIOPHYSICS SYSTEMS, INC.
Baldwin Place Road
Mahopac, New York 10541

Request therefor having been duly made by Alexander P. Rosenberg, Counsel for the General Counsel of the National Labor Relations Board
whose address is 26 Federal Plaza, Room 3614, New York, New York 10007
Telephone: (212) 264-0323
YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge *of the National Labor Relations Board,*
at 26 Federal Plaza, Room 3614
in the City of New York
on the 14th *day of* July , *1975* , *at* 11 *o'clock* a. *m.*
of that day to testify in the Matter of BIOPHYSICS SYSTEMS, INC., Case No. 2-CA-13562
and on any adjourned, rescheduled, or continued date thereof,

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

See ATTACHMENT A

B- 154628

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

Issued at New York, New York
this 7th *day of* July , *1975*

NOTICE TO WITNESS.—Witness fees for attendance, subsistence, and mileage, under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

EXHIBIT g-5

ATTACHMENT A

1. A copy of the Biophysics Systems, Inc., personnel policies manual or booklet and such other documents, memoranda, or bulletins, which reflect the salary review and wage increase policies of Biophysics Systems, Inc., with respect to all full-time production, incoming inspection, shipping, receiving and stock employeed of Biophysics Systems, Inc., employed at its Mahopac, New York plant, for calendar years 1973, 1974, and 1975.

2. The payroll records for calendar years 1972, 1973, and 1974 for all employees whose names appear on the eligibility list for the election conducted in Case No. 2-RC-16670 (a copy of said list is attached) as will indicate any or all of the following information:

a. the date on which each of said employees was hired by Biophysics Systems, Inc.,

b. the date or dates on which each of said employees received a salary or wage review,

c. the date or dates on which each of said employees received an increase in wage rates,

d. the date or dates on which each of said employees was denied a wage increase.

3. Copies of all written disciplinary warnings issued to employees of Biophysics Systems, Inc., for calendar years 1972, 1973, 1974, and 1975.

ELIGIBILITY LIST

BIOPHYSICS SYTEMS, INC.
Case No. 2-RC-16670

Mr. Alex Gardoni
Mr. Paul Kennedy
Mr. Steven Rotta
Mr. Herbert Day
Mr. Raynard E. Fiorino

Mr. Karl Christofori
Mr. Brian R. McHugh
Mr. William Zacotinsky
Mrs. Catherine Darby
Mrs. Joan Kessel

Mr. Thomas Cooper
Ms. Jo Ann Marchigiani
Mrs. Florence Lockwood
Mrs. Mary McCallum
Mrs. Stella Nardi

Mrs. Rita Swack
Ms. Kathy M. Benedetto
Mrs. Helen Condon
Mrs. Arlene Horne
Mr. Malcolm McMillan

Mr. Raymond Maloney
Mr. Jeffrey Kover
Mr. James Odell
Mr. John McGinness

PROSKAUER ROSE GOETZ & MENDELSOHN
300 PARK AVENUE
NEW YORK, N.Y. 10022

TELEPHONE (212) 593-9000

WRITER'S DIRECT DIAL NUMBER

593-9442

WILLIAM H. ROSE
(1875-1931)

JOSEPH M. PROSKAUER
(1930-1971)

NORMAN S. GOETZ
(1945-1972)

CABLE: ROPUT
TELEX: ITT 421178
WU 125352

June 16, 1975

Mr. Sidney Danielson
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

Mr. Alex Rosenberg
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

Re: Biophysics Systems, Inc.
and Local 1783, I.B.E.W.
Case No. 2-CA-13562

Dear Sirs:

Pursuant to 5 U.S.C. §552, as amended by P.L. 93-502 (November 21, 1974), 29 U.S.C. §160(b), and §102.117 of the Rules and Regulations of the National Labor Relations Board, as amended by 40 F.R. 7290 (February 19, 1975), as well as the constitutional principle of due process, Respondent requests that complete copies of all affidavits and/or signed statements, which were obtained during the course of the Regional Director's investigation of those witnesses who the General Counsel anticipates calling to testify during the hearing in the above-captioned matter be made available to Respondent promptly.

In the alternative, and without prejudice to Respondent's right to receive complete copies of those affidavits and statements, Respondent requests copies of the affidavits and/or statements of the above witnesses with all personal identification removed.

EXHIBIT g-6

In addition, Respondent requests copies of all authorization cards signed by Respondent's employees selecting Local 1783 as their collective bargaining representative.

Respondent also requests copies of all notes, memoranda, correspondence, papers, reports, inter-office communications, minutes of meetings, and all other records and documentary material in the custody or control of the Regional Director and General Counsel, which were obtained during the course of the investigation of this matter, and which are inconsistent with or conflict with the charges alleged in the complaint, or which show or may tend to show that Respondent may not have committed the unfair labor practices alleged therein.

Respondent assumes financial responsibility, in full, for charges incurred by the Regional Director through document searches and duplication, in responding to this request, under 5 U.S.C. §552, as amended, and §102.117 of the Rules and Regulations of the Board, as amended.

Should you decline to comply with Respondent's requests, please promptly advise the undersigned so that Respondent can take all steps necessary to protect its legal rights under the circumstances.

Sincerely yours,

Saul G. Kramer

SGK:dsl

HAND DELIVERY

cc: Herbert Simon, Esq.
99 W. Hawthorne Avenue
Valley Stream, New York 11530

Local 1783, I.B.E.W.
470 Mamaroneck Avenue
White Plains, New York 10605

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

NATIONAL LABOR RELATIONS BOARD
REGION 2
Federal Building, Room 3614, 26 Federal Plaza
New York, New York 10007
Telephone 264-0300

June 20, 1975

Saul G. Kramer, Esquire
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

Re: Biophysics Systems, Inc
Case No. 2-CA-13562

Dear Mr. Kramer:

This is in response to your letter dated June 16, 1975, received by this office on that date, in which you requested copies of numerous records assembled by this agency in connection with the above-captioned matter. Your request must be denied. As more fully detailed below, the records which you have requested are privileged from disclosure under one or more of the exemptions contained in Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(5) and (7(A),(C) or (D)).

The "complete copies of all affidavits and/or signed statements, which were obtained during the course of the Regional Director's investigation [for] those witnesses who the General Counsel anticipates calling to testify during the hearing in the above-captioned matter. . .", which you have requested, are investigatory records privileged from disclosure by exemption (7(A),(C), and (D)) of Section 552(b) of the Freedom of Information Act. Exemption (7)(A)exempts from disclosure investigatory records where disclosure thereof would interfere with enforcement proceedings. In the Board's processing of cases, much information is obtained from individuals who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the National Labor Relations Act, the Board must be able to obtain in its investigations all potentially relevant information. The protection of the identities of individuals and the substance of the information which they submit during the Board's investigation is an important means for assuring the agency's continuing ability to obtain such relevant information. If the Board were forced to disclose information submitted or obtained during the investigation of a case, other than in those circumstances provided in Section 102.118(b) of its Rules and Regulations, it would substantially deter voluntary cooperation, hinder obtaining

EXHIBIT g-7

information from all potential sources, and consequently, substantially interfere with present and future enforcement proceedings. Cf. *N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26.*

Moreover, disclosure of the material which you have requested is inimicable to the adversarial process and would do violence to the historic privilege against disclosure of an attorney's work product. See, *N.L.R.B. v. Sears Roebuck and Co., (April 28, 1975) 89 LRRM 2001; Hickman v. Taylor, 329 U.S. 495 (1946); Frankel v. Securities and Exchange Commission, 460 F. 2d 813, 817.*

Also, since these statements contain matter personal to the individuals supplying the statements and to the individuals referred to in those statements, they are exempt from disclosure under exemption (7)(C). This exemption protects the personal privacy of individuals submitting statements and individuals named therein, and requires the balancing of their interests in privacy against the interest of a requesting party, such as yourself. Since you have submitted no considerations which would, I find, overcome the privacy rights of these individuals, their right of privacy must prevail.

The requested statements are also within exemption(7)(D) because their disclosure would reveal the identities of a confidential source, i.e., an individual who provides information under an express assurance of confidentiality, or in circumstances from which such assurances can reasonably be inferred. As noted above, individuals giving statements to the Board during the course of an investigation are advised and assured that their statements will remain confidential, except as provided by Section 102.118 of the Board's Rules and Regulations. This policy of protecting confidential sources of information has been consistently followed in the administration of the National Labor Relations Act and is well known to those persons dealing with this agency. Accordingly, since the individuals furnishing statements in the instant case are confidential sources, exemption(7)(D) authorizes our refusal to supply the requested statements which would identify these individuals.

Further, the deletion of names from these statements would not preserve the interests recognized by exemptions (7)(A),(C), and (D) since disclosure of the material contained therein would, itself, constitute invasion of personal privacy, reveal confidential sources, and, consequently interfere with enforcement proceedings under the considerations set forth above. Moreover, the considerations for non-disclosure set forth herein are particularly compelling with respect to statements by, or concerning employees of, the respondent-employer in this proceeding. Deletion of portions sufficient to prevent an unwarranted invasion of personal privacy or prevent disclosure of confidential sources would result in a record so fragmented as to be incoherent and not responsive to your request.

For the reasons set forth above, I find that the "copies of all authorization cards signed by Respondent's employees selecting Local 1783 as their

collective bargaining representative," which you have requested, also are privileged from disclosure under exemptions (7)(A),(C), and (D).

Your dragnet request for "copies of all notes, memoranda, correspondence, papers, reports, inter-office communications, minutes of meetings, and all other records and documentary materials in the custody or control of the Regional Director and General Counsel, which were obtained during the course of the investigation of this matter and which are inconsistent with or conflict with the charges alleged in the complaint, or which show or may tend to show that Respondent may not have committed the unfair labor practices alleged therein" seeks records which are, as will be more fully explained, privileged from disclosure under exemptions (5) and/or (7)(A),(C), or (D) of the Freedom of Information Act.

The notes, memoranda, reports, inter-office communications, minutes of meetings and other documentary materials, are privileged from disclosure under exemption (5), since they are intra-agency memoranda which would not be available by law to a party other than an agency in litigation with the Board. The legislative history of exemption (5) makes it clear that this sub-section was designed to protect and promote the objectives of fostering frank deliberation and consultation within the agency in the policy-making stage, and to prevent a premature disclosure of policy which could disrupt agency procedure. Thus, exemption (5) is based upon and preserves the privilege against disclosure of intra-agency and inter-agency memoranda reflecting the deliberative and consultative process so that communications between those involved in the process might be uninhibited. The aforesaid requested materials reflect the views of Board agents concerning prosecutorial policies and the processing of unfair labor practice cases. Since they discuss strengths and weaknesses of the evidence, analyze various legal theories, and suggest litigation strategies and settlement possibilities, said documents clearly reflect the deliberative and consultative process of the agency which exemption (5) protects from forced disclosure. See *Sears Roebuck, supra; Barceloneta Shoe Corp. v. Compton, 271 F, Sup. 591 (D.C. P.R.).*

Also, with respect to the aforesaid requested documents which are intra-agency communications, there are no "factual" portions of these memoranda which are not inextricably intertwined with policy-making processes, or which can be severed from the exempt portions of said documents without compromising the private remainder of the documents. *EPA v. Mink, 410 U.S. 73; Soucie v. David, 448 F. 2d 1067 (D.C. Cir.).*

Further, all the records and materials requested additionally are privileged from disclosure under exemptions (7)(A),(C) and (D) for the reasons set forth with respect to your demand for affidavits.

The undersigned is responsible for the determinationa that the records you have requested are privileged from disclosure under the Freedom of Information Act.

You may obtain a review of that determination under the provisions of Section 102.117(c)(2)(ii) of the Board's Rules and Regulations by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D. C. 20570, within 20 days (excluding Saturdays, Sundays, and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Very truly yours,

Sidney Danielson
Regional Director

PROSKAUER ROSE GOETZ & MENDELSOHN
300 PARK AVENUE
NEW YORK, N.Y. 10022

TELEPHONE: (212) 593-9000

WRITER'S DIRECT DIAL NUMBER
593-9442

ALFRED L. ROSE
WALTER MENDELSOHN
ALFRED APPEL
MILTON H. FRIEDMAN
CHARLES GOSNER
HOWARD LICHTENSTEIN
JAMES J. FELD
GEORGE M. SHAPIRO
GERALD SILBERT
WILLIAM P. HIGGINS, JR.
EDWARD SIANI
PHILIP J. HINSCH
JACOB IMBERMAN
ROBERT HELLER
GEORGE O. GALLANTZ
ROBERT J. LEVINSOHN
ANDREW D. REINEMAN
BERNARD GOLD
RUTH G. SCHAPIRO
KLAUS EPPLER
HOWARD A. SHAPIRO
MARTIN J. OPPENHEIMER
ALAN S. ROSENBERG
LARRY M. LAVINSKY
STEPHEN B. KAYE
STANLEY ROMAIROFF
SEA H. LOSTRAMEN
MARVIN BRUNER
SAUL G. KRAMER
ROBERT M. KAUFMAN
RONALD S. SCHACHT
MORTON M. MANZER
ARON N. KATZ
JEROLD ZIESELMAN
DAVID I. GOLDBLATT
YALE H. GELLMAN
ARNOLD J. LEVINE
HOWARD N. LEFKOWITZ
BERNARD TANNENBAUM
HARVEY E. BENJAMIN
ALAN S. JAFFE
DAVID J. STERN
STEVEN J. STEIN
MICHAEL A. CARDOZO
L. ROBERT BATTERMAN
HOWARD L. GANZ
PAUL M. EPSTEIN
LAWRENCE J. ROTHENBERG

WILLIAM R. ROSE
(1875-1931)

JOSEPH M. PROSKAUER
(1930-1971)

NORMAN S. GOETZ
(1925-1972)

CABLE: ROPUT
TELEX: ITT 421176
WU 125352

July 2, 1975

Peter J. Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue N.W.
Washington, D.C. 20570

Re: Biophysics Systems, Inc.
Case No. 2-CA-13562

Dear Mr. Nash:

Reference is made to the enclosed letter from Mr. Sidney Danielson, Regional Director of the Second Region of the NLRB, rejecting respondent's request, also enclosed, for various documents presently in his possession. Respondent herewith appeals from the determination of the Regional Director pursuant to Section 102.117(c)(2)(ii) of the Board's Rules and Regulations.

Respondent's request for affidavits, statements, authorization cards and various other materials obtained by the Regional Director in the course of his investigation of the unfair labor practices charged in the complaint was based not only on the Freedom of Information Act, but also on the National Labor Relations Act itself and the "constitutional principle of due process". Nevertheless, Mr. Danielson's response was limited solely to the provisions of the Freedom of Information Act.

While respondent recognizes the need for protecting the confidentiality of the Board's investigatory sources, it believes that elemental notions of due process require that the Regional Director be ordered to respond favorably to some or all of respondent's requests. Without these materials, it will prove difficult, if not impossible, for respondent adequately to prepare this case for the hearing that is presently scheduled to begin on July 14, 1975.

EXHIBIT g-8

JNM

To determine whether Local 1783 engaged in illegal supervisory solicitation or misrepresentations during its attempts to get authorization cards from Biophysics employees and in the course of the subsequent election campaign, respondent has requested copies of the affidavits and/or statements of those persons the General Counsel anticipates calling to testify during the hearing. The same is true for the copies of the authorization cards obtained by Local 1783 that respondent has requested.

Respondent has offered to accept all the aforesaid documents with all personal identification removed. Yet the Regional Director has chosen to deny these requests on the ground that such deletions would result in a "fragmented" record. Respondent submits that this response is in fact no response at all, because it rejects the request on grounds of convenience while at the same time apparently recognizes respondent's constitutional right to these documents. As a result, the Regional Director's refusal to grant respondent's request is arbitrary and capricious, and violates the constitutional imperative which requires that the respondent know clearly the charges brought against it by the NLRB, plus its right to be made aware of any exculpatory evidence in the Regional Director's possession.

Furthermore, the Regional Director's claim that handing over such material would violate 5 U.S.C. §552(b)(7)(A), (C) and (D) is frivolous under the present circumstances. To refuse respondent's request on the grounds that it would interfere with enforcement proceedings, would constitute an unwarranted invasion of personal privacy and would disclose the identity of confidential sources is patently improper. Respondent is not asking the Regional Director to jeopardize his sources; but is instead willing to accept documents with all names and other identification deleted.

In a similar vein, any records in the Regional Director's or General Counsel's possession which may show that respondent may not have committed the unfair labor practices alleged in the complaint are also obviously crucial to the proper preparation of respondent's defense. To deny its request for these materials on the ground that "premature disclosure" might "disrupt agency procedure" is to elevate form over substance. Moreover, respondent contends that the materials it requests are not privileged "intra-agency memoranda" under 5 U.S.C. §552(b)(5), as the Regional Director claims, because respondent only desires such information as may clear it of the charges made against it, rather than discovering the inner workings of the NLRB.

Perhaps even more importantly, the Regional Director's decision in this respect denies respondent the basic right of due process to know all information in the government's possession which may be adverse to its position and helpful to respondent's defense. Accord, Giles v. Maryland, 386 U.S. 66 (1967); Brady v. Maryland, 373 U.S. 83 (1963); Grant v. Alldredge, 498 F.2d 376 (2d Cir. 1974).

By requiring respondent to engage in a burdensome and expensive hearing to find out whether there is any merit to the good faith defenses that it has raised, and by forcing it to go through this hearing without any exonerating evidence that it may be unaware of simply because of the Regional Director's intransigence, is a clear violation of respondent's protected rights and cannot be permitted to continue.

Given the substantial reasons that respondent has offered in support of its documentary demands, it is clear that the Regional Director's decision to reject them out of hand without considering the consequences of his refusal on respondent's constitutional rights is improper and should be corrected immediately. Respondent therefore requests that the Regional Director's decision be vacated and that he be ordered to comply with respondent's legitimate demands.

Respondent also requests that oral argument be permitted in this appeal and that the hearing in this matter be postponed pending a determination of the appeal. Counsel for the General Counsel, Alex Rosenberg, has advised us that he is not opposed to such a postponement.

Sincerely yours,

Saul G. Kramer

SGK/ch
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
SPECIAL DELIVERY

cc: Sidney Danielson, Esquire
Alex Rosenberg, Esquire

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BIOPHYSICS SYSTEMS, INC.,	:	Case No. 2-CA-13562
and	:	
LOCAL 1783, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS	:	DEMAND TO GENERAL COUNSEL FOR A LIST OF ANTICIPATED WITNESSES

S I R S :

PLEASE TAKE NOTICE that Respondent requires you to serve upon the undersigned, within ten days after the receipt hereof, a list of the witnesses that the General Counsel anticipates calling to testify during the course of the hearing in the above-captioned matter. Should you decline to comply with Respondent's demand, please notify the undersigned of your decision within ten days after the receipt hereof so that Respondent can take all steps necessary to protect its legal rights under the circumstances.

Dated: New York, New York
June 5, 1975

Yours, etc.,

Proskauer Rose Goetz & Mendelsohn
Attorneys for Biophysics Systems, Inc.

By _____
Saul G. Kramer
300 Park Avenue
New York, New York 10022
(212) 593-9000

EXHIBIT B-9

TO: Alan Perlstein, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

COPIES TO: Herbert Simon, Esq.
99 W. Hawthorne Avenue
Valley Stream, New York 11530

Local 1783, I.B.E.W.
470 Mamaroneck Avenue
White Plains, New York 10605

Sidney Danielson, Esq.
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

ELECTRONICS SYSTEMS, INC.

and

Case No. 2-CA-13562

LOCAL 1783, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

GENERAL COUNSEL'S OPPOSITION
TO RESPONDENT'S DEMAND FOR A
LIST OF ANTICIPATED WITNESSES

The undersigned opposes Respondent's demand for a list of anticipated witnesses, said demand having been filed on June 16, 1975, for the following reasons:

The information requested relates to evidentiary matter or calls for the names of employees to whom specific unfair labor practices were directed. The Respondent is not entitled to compulsory production of such information pre-trial. See *William H. Dixon, 130 NLRB 1204; North American Rockwell Corp. v. N.L.R.B., 389 F. 2d 866 (C.A. 10, 1968); Walsh-Lumpkin Wholesale Drug Co., 129 NLRB 294.*

Dated: New York, New York
July 2, 1975

Respectfully submitted,

Alexander P. Rosenberg
Counsel for the General Counsel
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

TO: Eugene Goslee, Chief Administrative Law Judge
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

cc: Saul G. Kramer, Esquire
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue, New York, New York 10022

Herbert Simon, Esquire
90 W. Hawthorne Avenue, Valley Stream, New York 11580

EXHIBIT g-10

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BIOPHYSICS SYSTEMS, INC.

and

CASE NO. 2-CA-13562

LOCAL 1733, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

ORDER REFERRING MOTION TO THE
CHIEF ADMINISTRATIVE LAW JUDGE

Counsel for Respondent having filed with the Regional Director, Region 2, a demand for a list of anticipated witnesses; and

Counsel for the General Counsel having filed with said Regional Director an opposition to said demand;

IT HEREBY IS ORDERED that pursuant to Section 102.25 of the Rules and Regulations of the National Labor Relations Board, said demand and opposition be, and they hereby are, referred to the Chief Administrative Law Judge for ruling.

Dated: New York, New York
July 3, 1975

Sidney Danielson
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10007

EXHIBIT g-11

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BIOPHYSICS SYSTEMS, INC.,	:	Case No. 2-CA-13562
and	:	
LOCAL 1783, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS	:	DEMAND TO GENERAL COUNSEL FOR A BILL OF PARTICULARS

S I R S :

PLEASE TAKE NOTICE that the Respondent requires you to serve upon the undersigned, within ten days after the receipt hereof, particulars to the Complaint herein, as follows:

1. With respect to the allegations contained in paragraph 7 of the Complaint:

(a) Describe the contents of all authorization cards signed by Biophysics employees.

(b) State whether any of the cards were solicited or otherwise obtained, in whole or in part, by Alexander Gardoni or any other Biophysics supervisor, and, if so, identify those Biophysics employees so solicited.

2. With respect to the allegations contained in paragraph 10 of the Complaint:

(a) State when and where the alleged interrogation of Biophysics employees took place.

(b) Identify which Biophysics employees were allegedly interrogated.

(c) State whether any officers and supervisors of Biophysics, other than those mentioned, allegedly interrogated employees, and identify them.

(d) Describe all statements allegedly made by any parties present at the alleged interrogations.

3. With respect to the allegations contained in paragraph 11 of the Complaint:

(a) State when the alleged threats to Biophysics employees took place.

(b) Identify all alleged Biophysics employees present at the Dutch Mill Restaurant when the alleged threats were made.

(c) State whether any Biophysics officers and supervisors, other than those mentioned, were present when the alleged threats were made to Biophysics employees, and identify them.

(d) Identify what work being performed by unit employees was alleged threatened to be transferred, and where it was allegedly to be transferred to, if Local 1783 was selected as the employees' collective bargaining representative.

(e) Describe all alleged threats, warnings and directives allegedly made by Mitchell Friedman to Biophysics employees.

4. With respect to the allegations contained in paragraph 12 of the Complaint:

(a) State when and where the alleged wage increases were alleged offered, promised and granted to Biophysics employees.

(b) Identify those Biophysics employees who were allegedly offered, promised and granted wage increases to refrain from becoming or remaining members of Local 1783.

(c) State whether any Biophysics officers and supervisors were present, other than those mentioned, when the alleged wage increases were allegedly offered, promised and granted to Biophysics employees, and identify them.

(d) State the amount of the alleged wage increas allegedly offered, promised and granted to Biophysics employees, and whether such offer was oral or in writing.

(e) Describe all alleged statements made by Biophysics officers, supervisors and employees when the alleged wage increases were allegedly offered, promised and granted to Biophysics employees.

5. With respect to the allegations contained in paragraph 13 of the Complaint:

(a) Identify which Biophysics employee received an alleged disciplinary warning because of his membership in, and activities on behalf of, Local 1783.

(b) State the nature of the disciplinary warning alleged therein.

(c) State whether any other Biophysics officers, supervisors or employees were present when the alleged disciplinary warning was issued, and identify them.

(d) Describe all other statements allegedly made by Joseph Silvestro, by the employee who received the alleged disciplinary warning, and by any other Biophysics officers, supervisors or employees who were present when the alleged disciplinary warning was issued.

6. With respect to the allegations contained in paragraph 14 of the Complaint:

(a) State when and where the alleged threats were made to Biophysics employees.

(b) Identify all Biophysics employees present when the alleged threats were made.

(c) State whether any Biophysics officers and supervisors, other than those mentioned, were present when the alleged threats were made to Biophysics employees, and identify them.

(d) Identify what work being performed by unit employees was allegedly threatened to be transferred, and where it was allegedly to be transferred to, if Local 1783 was selected as the employees' collective bargaining representative.

Should you decline to comply with Respondent's demand, please advise the undersigned within ten days after the receipt hereof so that Respondent can take all steps necessary to protect its legal rights under the circumstances.

Dated: New York, New York
June [illegible], 1975

Yours, etc.,

Proskauer Rose Goetz & Mendelsohn
Attorneys for Biophysics Systems, Inc.

By _____
Saul G. Kramer
300 Park Avenue
New York, New York 10022
(212) 593-9000

TO: Alex Rosenberg, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

COPIES TO: Herbert Simon, Esq.
99 W. Hawthorne Avenue
Valley Stream, New York 11530

Local 1783, I.B.E.W.
470 Mamaroneck Avenue
White Plains, New York 10605

Sidney Daniels on, Esq.
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BIOPHYSICS SYSTEMS, INC.

and

Case No. 2-CA-13562

LOCAL 1783, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

GENERAL COUNSEL'S RESPONSE IN PART AND OPPOSITION IN PART TO RESPONDENT'S DEMAND FOR BILL OF PARTICULARS

1 GENERAL COUNSEL'S RESPONSE IN PART

The undersigned responds to Respondent's demand for a Bill of Particulars, said demand having been filed on June 16, 1975, as follows:

Item 1(a)

A sample of the type of authorization card signed by employees of Biophysics Systems, Inc., is attached hereto as Exhibit 1.

Item 2(a)

The interrogation by Mitchell Freedman took place in the Biophysics parking lot and at the Dutch Mill Restaurant during the first week of November, 1974; the exact date is presently unknown.

The interrogation by Joseph Silvestro took place in Silvestro's office at the Biophysics plant in the latter part of November 1974; the exact date is presently unknown.

Item 2(c)

No other supervisors or officers interrogated employees.

Item 3(a)

General Counsel does not now know the precise date on which Mitchell Freedman threatened employees at the Dutch Mill Restaurant.

Item 3(c)

No other supervisors or officers were present.

Item 4(a)

Said wage increases were offered, promised, and granted at the Biophysics Plant. The exact dates are presently unknown.

Item 4(c)

Biophysics supervisor Frank Amanto was present.

EXHIBIT G-12

Said offers were oral.

Item 5(a)(c)

A written disciplinary warning for performing work too slowly was issued to an employee. Fred Cole was present during a portion of the session during which said warning was issued.

Item 6(a)

Said threats were made at the Biophysics Plant. The said dates are set forth with sufficient particularity in the complaint.

Item 6(c)

No other supervisors or officers were present.

II GENERAL COUNSEL'S OPPOSITION IN PART

The undersigned opposes the remaining items contained in Respondent's demand for a Bill of Particulars for the following reasons:

Items 2(b), 3(b), 4(b), 5(a) and 6(b) calls for the names of employees to whom specific unfair labor practices were directed.

Items 1(b), 2(d), 3(d), 3(e), 4(d)(in part), 4(e), 5(d) and 6(d) request evidentiary matter.

The Respondent is not entitled to compulsary pre-trial production of such information.

See William H. Dixon, 130 NLRB 1204, North American Rockwell Corp. v. NLRB, 389 F2d 866 (8th Cir., 1968); Walsh-Lumpkin Wholesale Drug Co., 129 NLRB 294.

Dated: New York, New York

July 2, 1975

Respectfully submitted,

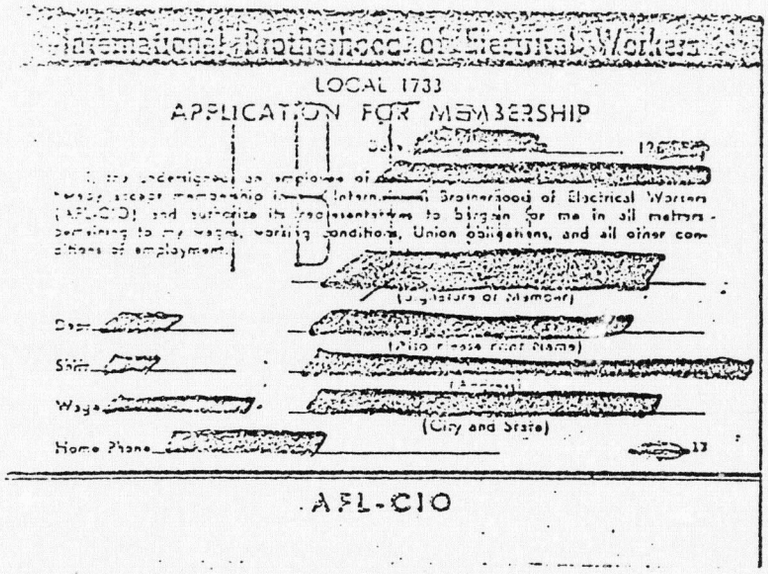
Alexander P. Rosenberg
Counsel for the General Counsel
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

TO: Eugene Coslee
National Labor Relations Board
Chief Administrative Law Judge
1717 Pennsylvania Avenue, N. W.
Washington, D.C. 20570

Saul G. Kramer, Esquire
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

Herbert Simon, Esq.
99 W. Hawthorne Avenue
Valley Stream, New York 11530

EXHIBIT 1


International Brotherhood of Electrical Workers

LOCAL 1733

APPLICATION FOR MEMBERSHIP

Date 19

I, the undersigned, an employee of [illegible] hereby accept membership in the International Brotherhood of Electrical Workers (AFL-CIO) and authorize its representatives to bargain for me in all matters pertaining to my wages, working conditions, Union obligations, and all other conditions of employment.

(Signature of Member)

Date

Shift

Wage

Home Phone

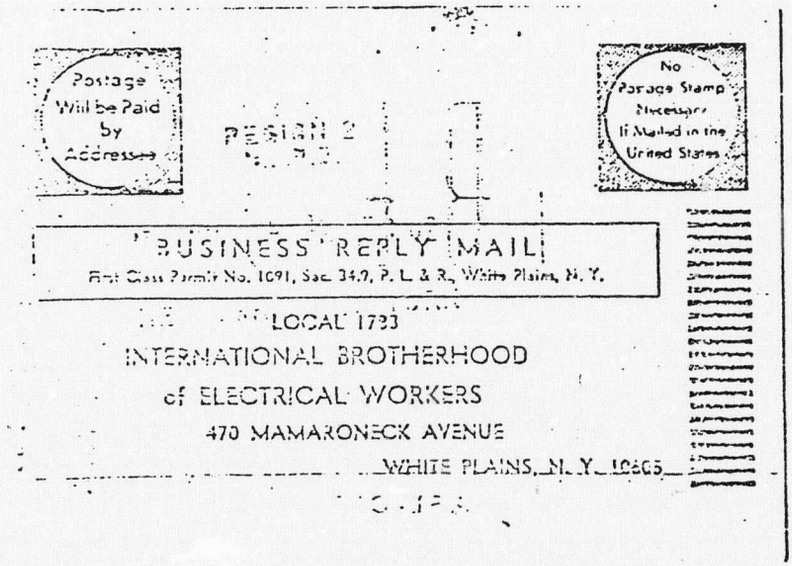
(Print or type first name)

(Address)

(City and State)

13

AFL-CIO


Postage Will be Paid by Addressee

No Postage Stamp Necessary If Mailed in the United States

BUSINESS REPLY MAIL

First Class Permit No. 1091, Sec. 34.9, P. L. & R., White Plains, N. Y.

LOCAL 1733

INTERNATIONAL BROTHERHOOD

of ELECTRICAL WORKERS

470 MAMARONECK AVENUE

WHITE PLAINS, N. Y. 10605

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BIOPHYSICS SYSTEMS, INC.

and

CASE NO. 2-CA-13562

LOCAL 1783, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

ORDER REFERRING MOTION TO THE
CHIEF ADMINISTRATIVE LAW JUDGE

Counsel for Respondent having filed with the Regional Director Region 2, a demand for a bill of particulars; and

Counsel for the General Counsel having filed with said Regional Director a response in part and opposition in part to said demand;

IT HEREBY IS ORDERED that pursuant to Section 102.25 of the Rules and Regulations of the National Labor Relations Board, said demand, response, and opposition be, and they hereby are, referred to the Chief Administrative Law Judge for ruling.

Dated: At New York, New York
July 3, 1975

Sidney Daniels
Sidney Daniels
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza
New York, New York 10007

EXHIBIT G-14

UNITED STATES GOVERNMENT

Memorandum

TO : Sidney Danielson, Director, Region 2 DATE: July 15, 1975

FROM : Alexander P. Rosenberg, Counsel for the General Counsel

SUBJECT: Biophysics Systems, Inc.
Case No. 2-CA-13562

GENERAL COUNSEL'S STATEMENT IN OPPOSITION TO RESPONDENT'S PETITION TO REVOKE SUBPOENA DUCES TECUM AND REQUEST TO REFER SAME TO THE CHIEF ADMINISTRATIVE LAW JUDGE FOR RULING

On July 10, 1975, by letter, Respondent petitioned the Regional Director, pursuant to Section 102.31(b) of the Board's Rules and Regulations, to revoke a subpoena duces tecum requested by the undersigned in the above-captioned unfair labor practice proceeding; said hearing is presently scheduled to commence on September 9, 1975. (A copy of Respondent's petition to revoke and documents submitted in support thereof, are submitted herewith.)

In support of its petition to revoke said subpoena, Respondent states that the Regional Director and Counsel for the General Counsel refused to furnish to Respondent, certain information requested under the Freedom of Information Act and a Demand for a Bill of Particulars, which it alleges will be used to prepare its defense in the instant case. Respondent then asserts that because of the aforesaid refusal to produce information, it is privileged from supplying the materials which Counsel for the General Counsel has requested in subject subpoena (which Respondent notes will "apparently be used in preparation for the upcoming hearing..."). Respondent's argument is clearly without merit.

The authority to subpoena documents for trial extends to Counsel for the General Counsel, as to other parties, in a proceeding before the Board under Section 11 of the Act. Counsel for the General Counsel contends that the determination as to whether the subpoenaed documents are to be produced should be made on the same grounds applicable to any other party to the proceeding. Nothing contained in the National Labor Relations Act or in the Freedom of Information Act warrants the conclusion Respondent seeks here to establish, i.e. that Respondent can refuse to respond to a subpoena on the ground that the General Counsel and the Board have refused to disclose material requested by Respondent under provisions of the Freedom of Information Act and in its demand for particulars. 1/ It is submitted that no such "mutuality" was intended by Congress.

1/ Moreover, the materials which the Regional Director and Counsel for the General Counsel have declined to produce are privileged from disclosure under one or more of the exemptions contained in Section 552(b) of the Freedom of Information Act, 5 U.S.C. § 552(b)(5) and ((7)(A)(C)or (D)), and under traditional Board law.

EXHIBIT h

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Furthermore, Respondent's argument is based on the erroneous assumption that like Respondent, Counsel for the General Counsel seeks the subpoenaed records for use in preparing for the hearing in the instant matter. Subject subpoena, unlike Respondent's various requests, does not call for the pre-trial production of any materials. The subpoena seeks only that the requested documents be produced at trial. 2/

Respondent further asserts that the subpoena should be revoked because it seeks a multitude of documents, is unreasonable under the circumstances, seeks documents which are irrelevant and immaterial to the resolution of the unfair labor practices alleged in the complaint, is overly broad, burdensome, and constitutes a fishing expedition.

The undersigned submits that here again, Respondent takes an erroneous position. Each of the items requested in Attachment A to subject subpoena, describes with a high degree of particularity, certain documents in Respondent's possession which are directly related to allegations contained in the Complaint and Notice of Hearing in the instant matter. 3/ Thus, items 1 and 2 of Attachment A request a limited number of specific documents, are limited to the collective bargaining unit in issue, and are directly related to paragraph 11 of the complaint, which alleges, in substance, that Respondent granted wage increases to unit employees to chill their support for the Union. The documents requested encompass the minimum period of time required to properly evaluate Respondent's wage increase policies and practices, inasmuch as the Respondent's work force has fluctuated during the requested period.

Item 3 seeks production of specific written documents which are directly related to paragraph 13 of the Complaint, and which together with Counsel for the General Counsel's response to Respondent's Demand for a Bill of Particulars, allege that Respondent issued a written disciplinary warning to an employee because of her Union membership. The time period covered by said request is the minimum required to prove the allegation in question. Counsel for the General Counsel believes that the number of documents sought in item 3 is minimal. Respondent's assertion, therefore, that said item is overly broad and oppressive is specious.

Respondent's contention that Counsel for the General Counsel is engaging in a fishing expedition is without merit. Each item requested in said subpoena is directly related to allegations of the Complaint. The proper functioning of the Board's investigative and prosecutorial processes requires, as the Board's Rules and Regulations recognize, that the Board be permitted to obtain the production of evidence relating to any matter under investigation. 4/

2/ Although production of the requested materials at a pre-trial conference would facilitate their analysis and avoid unnecessary delay at trial, the subpoena does not require such pre-trial production.

3/ Counsel for the General Counsel notes that under Section 11 of the Act and Section 102.31 of the Board's Rules and Regulations, evidence is subject to production pursuant to subpoena where it merely relates to any matter under investigation or in question. Relevance and materiality to complaint allegations, although present here, are not required.

4/ See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 204, 214; cf. Myers v. Bethlehem Corp., 303 U.S. 41.

BEST COPY AVAILABLE

It is respectfully requested that pursuant to Section 102.31(b, of the Board's Rules and Regulations, Respondent's petition to revoke the subpoena requested herein, and this statement in opposition be referred to the Chief Administrative Law Judge for ruling.

A. P. R.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BIOPHYSICS SYSTEMS, INC.

and

Case No. 2-CA-13562

LOCAL 1783, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

ORDER REFERRING PETITION TO REVOKE SUBPOENA
TO THE CHIEF ADMINISTRATIVE LAW JUDGE

Counsel for Respondent having filed with the Regional Director, Region 2, a petition to revoke a subpoena *duces tecum* issued to Respondent at the request of Counsel for the General Counsel; and

Counsel for the General Counsel having filed with said Regional Director a statement in opposition to said petition;

IT HEREBY IS ORDERED that pursuant to Section 102.31(b) of the Rules and Regulations of the National Labor Relations Board, said petition and statement in opposition be, and they hereby are, referred to the Chief Administrative Law Judge for ruling.

Dated: New York, New York

July 16, 1975

Sidney Danielson

Sidney Danielson, Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

BIOPHYSICS, SYSTEMS, INC.

and

Case No. 2-CA-13562

LOCAL 1783, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

ORDER ON PETITION TO REVOKE SUBPOENA

Respondent having filed with the Regional Director a request that the Regional Director revoke Subpoena Duces Tecum No. B-154628 heretofore served upon Respondent; the Regional Director having treated that request as a petition to revoke and having referred it to the Chief Administrative Law Judge, along with a Statement in Opposition thereto; and the undersigned having been duly designated as the Administrative Law Judge to rule on said petition; now, after consideration of the aforesaid papers and of the complaint in this proceeding,

IT IS HEREBY ORDERED that Respondent's petition be, and the same hereby is, denied. In light of the complaint's allegations and the representations made in the Statement in Opposition concerning the purposes for which the subpoenaed documents are intended, it appears to the undersigned that the documents whose production is sought are reasonably related to matters in issue in this proceeding and are sufficiently limited and specific in their description so as not to place an undue burden on Respondent in their production. The other grounds urged by Respondent for revocation of the subpoena have also been considered by the undersigned, and are found without merit for the reasons stated in Counsel for the General Counsel's Opposition, reasons which the undersigned believe to be valid and with which he concurs.

Arthur Leff
Administrative Law Judge

Dated: July 18, 1975

EXHIBIT 3

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

BIOPHYSICS SYSTEMS, INC.

and

Case No. 2-CA-13562

LOCAL 1783, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

ORDER ON DEMAND FOR A LIST OF ANTICIPATED WITNESSES

Respondent having filed a Demand, herein treated as a motion, for a List of the General Counsel's Anticipated Witnesses in this proceeding; Counsel for the General Counsel having filed an Opposition thereto; and the said motion having been duly referred to the undersigned for disposition; now, after consideration,

IT IS HEREBY ORDERED that Respondent's motion be denied. Under long-settled Board policy, a respondent in an unfair labor practice proceeding is not entitled to a pre-hearing disclosure of the names of the General Counsel's witnesses. See Walsh-Lumpkin Wholesale Drug Co., 129 NLRB 294. Respondent has presented no good reason for deviation from that policy in this case.

Arthur Leff
Administrative Law Judge

Dated: July 18, 1975

EXHIBIT k

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

GEOPHYSICS SYSTEMS, INC.

and

Case No. 2-CA-13562

LOCAL 1783, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

ORDER ON DEMAND FOR BILL OF PARTICULARS

Respondent having filed a Demand, herein treated as a motion, for a Bill of Particulars; Counsel for the General Counsel having filed a Response in Part and Opposition in Part thereto; and the said motion having been duly referred to the undersigned for disposition; now, after consideration,

IT IS ORDERED that Respondent's motion, to the extent not voluntarily complied with by Counsel for the General Counsel in his Response to the motion, be, and the same hereby is denied, for the reasons, found good and sufficient, that are stated in the Opposition.

Arthur Leff
Administrative Law Judge

Dated: July 18, 1975

EXHIBIT 1

((Director
Region 2

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

Re: Biophysics Systems, Inc.
Case No. 2-CA-13562

Saul G. Kramer, Esquire
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

Dear Mr. Kramer:

Your appeal from the Regional Director's refusal to furnish information requested in your letter of June 16, 1975, has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of June 20, 1975. Regarding your contention that the Regional Director's assertion that deletion from the requested documents of matter privileged from disclosure under exemptions 7(C) and (D) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(C)) and (7(D)), would result in a record so fragmented as to be incoherent and not responsive was arbitrary and capricious on his part, it should be noted that even assuming that the resulting documents would be responsive to your request, they would be exempt under exemption 7(A) of the FOIA, 5 U.S.C. Section 552(b)(7(A)). The Court of Appeals for the Second Circuit has pointed out that Congress had a 2-fold purpose in enacting exemption 7. Frankel v. S.E.C., 460 F.2d 813, 817. The purposes enumerated by the Court were to keep confidential the procedures by which the Agency conducts its investigation and by which it has obtained information and to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court. Both of these forms of confidentiality were deemed necessary by the Court for effective law enforcement. In this regard see also N.L.R.B. v. Sears, Roebuck & Co., 95 S. Ct. 1504, n. 28 and Wellman Industries, Inc. v. N.L.R.B., 490 F.2d 427 (C.A. 4, 1974). Moreover, both Frankel, supra, and Wellman, supra, make it clear that the FOIA was not intended to give parties indirectly any earlier or greater access to investigatory files than they would have directly in litigation with the Agency and it is clear

EXHIBIT m

that this Agency, with the approval of the Court of Appeals for the Second Circuit, would not permit such pre-trial discovery. N.L.R.B. v. Interboro Contractors, 432 F.2d 855, 857-860.

Concerning your request for authorization cards, it is noted that the stated purpose of your request was to enable you to determine whether the Union engaged in illegal supervisory solicitation or misrepresentations. While you indicate a desire to obtain these cards, even with all identifying material deleted, it is unlikely that they will provide you with the information you have stated you are seeking. As the only information the anonymous authorization cards would provide is the number of such cards obtained by the Union, their disclosure would interfere with enforcement proceedings within the meaning of exemption 7.

The undersigned, Robert E. Allen, at the direction of, and pursuant to the policies established by, General Counsel Peter G. Nash, is responsible for the determination that the records you requested are privileged from disclosure under the Freedom of Information Act.

Judicial review of this determination may be obtained by filing a complaint in the district court of the United States in the district in which the complainant resides, or has his place of business, or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B).

Very truly yours,

Peter G. Nash
General Counsel

By
Robert E. Allen
Director, Office of Appeals

cc: Director, Region 2

87a(1)

533-9442

August 13, 1975

Sidney Danielson, Esq.
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

Re: Biophysics Systems, Inc.
Case No. 2-CA-13562

Dear Mr. Danielson:

In accordance with our discussion with Alexander Rosenberg yesterday afternoon, respondent Biophysics Systems, Inc. respectfully declines to comply with the subpoena duces tecum served upon it on July 7, 1975.

Sincerely yours,

Saul G. Kramer

SGK:dsl
cc: Alexander Rosenberg, Esq.

HAND DELIVERY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD, Applicant, -against- BIOPHYSICS SYSTEMS, INC., Respondent, and BIOPHYSICS SYSTEMS, INC., Respondent, -against- JOHN C. MILLER, Acting General Counsel of the National Labor Relations Board, and SIDNEY DANIELSON, Regional Director of the National Labor Relations Board, Region 2, Additional Defendants on the Counterclaims.	:	Civil Action ANSWER AND COUNTERCLAIMS

Respondent, Biophysics Systems, Inc. (hereinafter "Biophysics"), by its attorneys, Proskauer Rose Goetz & Mendelsohn, for its answer and its counterclaims to the application, states as follows:

1. Admits the allegations contained in paragraph a, except denies that it is chartered under the laws of the United States and alleges that it is organized under the laws of the State of New York.

2. Denies knowledge or information sufficient to form an opinion as to the truth of the allegations contained in paragraph b, except admits that the National Labor Relations Board (hereinafter "the NLRB") has issued Rules and Regulations (Series 8, as amended).

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph c, except: (a) Admits that a proceeding entitled Biophysics Systems, Inc. (Local 1783, International Brotherhood of Electrical Workers), Case No. 2-CA-13562, now is pending before the NLRB; (b) Admits that a charge was served and filed, that a complaint and notices of hearing have been issued by the NLRB and that it has filed an answer and an amended answer and refer to those documents (exhibits a, b, c-1, c-2, d-1, d-2, d-3 and d-4 annexed to the application of the NLRB) for the terms and conditions thereof; (c) Alleges that it also has filed with the NLRB a demand for bill of particulars, a demand for list of anticipated witnesses and a request for information under the Freedom of Information Act, 5 U.S.C. §552, 29 U.S.C. §160(b) and §102.117 of the Rules and Regulations of the NLRB; and (d) Alleges that the NLRB has refused to respond to the request for information and demand for list of witnesses and has only responded in part to the demand for bill of particulars. (Copies of the demands and request are annexed to the application of the NLRB as exhibits g-9, g-12, and g-6. Copies of the NLRB's responses to Biophysics' demands and requests are annexed to the application of the NLRB as exhibits g-10 (opposition to list of witnesses);

g-13 (response in part and opposition in part to demand for bill of particulars), g-7 and m (denial of request for information by Regional Director and denial of request for information by General Counsel)).

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph d, except admits that on July 9, 1975, Biophysics received, by registered mail, three subpoenas from the NLRB, one of which required Mitchell Friedman to appear and testify in the proceeding referred to in paragraph 3, supra, one of which required Joseph A. Silvestro to appear and testify in the proceeding referred to in paragraph 3, supra, and one of which required Biophysics to produce documents for the proceeding referred to in paragraph 3, supra, (hereinafter "the subpoena duces tecum"). (Copies of the three subpoenas are annexed to the application of the NLRB as exhibits g-3, g-4, and g-5).

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph e, except admits that it received the subpoena duces tecum and the subpoenas requiring Mitchell Friedman and Joseph A. Silvestro to appear and testify by registered mail on July 9, 1975.

6. Admits the allegations contained in paragraph f, refers to exhibits g(1-15) annexed to the application of the NLRB for the terms and conditions of the documents contained therein, and alleges that it has never sought revocation of the NLRB subpoenas requiring Mitchell Friedman and Joseph A. Silvestro to appear and testify.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph g, except admits that Counsel for the General Counsel prepared a statement in opposition to Biophysics' petition to revoke the subpoena duces tecum and refers to that statement (annexed to the application of the NLRB as exhibit h) for the terms and conditions thereof.

8. Admits the allegations contained in paragraphs h, i, j, and k and refers to the documents described in those paragraphs (annexed to the application of the NLRB as exhibits i, j, k, l, g-9, g-12, g-7, g-8, and m) for the terms and conditions thereof.

9. Admits the allegations contained in paragraph l except alleges that while it declined to comply with the subpoena duces tecum, it never declined to comply with the subpoenas requiring Mitchell Friedman and Joseph A. Silvestro to appear and testify.

10. Denies each and every allegation contained in paragraph m and alleges that the documents sought by the NLRB in the subpoena duces tecum are not relevant or material to the issues in the proceeding before the NLRB and alleges that by refusing to respond to Biophysics' requests for information, as set out in paragraph 3, supra, the NLRB has denied Biophysics the opportunity for a fair hearing and the opportunity to defend against the charges that have been made against it.

11. Admits the allegations contained in paragraph 11 n.

FOR A FIRST AFFIRMATIVE DEFENCE

12. The complaint filed by the NLRB in the proceeding now pending before it (and annexed to the application of the NLRB as exhibit b) contains the general allegation, at paragraph 14, that Biophysics "offered, promised and granted to its employees wage increases, to induce them to refrain from becoming or remaining members of Local 1783 ...."

13. The NLRB has failed and refused to particularize that claim despite Biophysics' repeated efforts to determine the basis for and specifics of that allegation. The NLRB not only failed to respond to Biophysics' request for information under, inter alia, the Freedom of Information Act, but also refused to answer the relevant portions of Biophysics' demand for bill of particulars (See, paragraph 4 of Biophysics' demand and the NLRB's response thereto, exhibits g-12 and g-13 annexed to the application of the NLRB).

14. Despite the NLRB's failure to particularize its claims against Biophysics or to provide Biophysics with copies of the documents on which it bases its claims, the NLRB now requires production not only of the company's "personnel policies manual or booklet and such other documents, memoranda, or bulletins, which reflect the salary review and wage increase policies of Biophysics . . . for calendar years 1973, 1974, and 1975" but also of

payroll records for calendar years 1972, 1973, and 1974 [for each employee eligible to vote in the election conducted prior to the proceeding now pending before the NLRB] as will indicate . . . (a) the date on which each said employee was hired . . . ; (b) the date or dates on which each of said employees received a salary or wage review; (c) the date or dates on which each of said employees received an increase in wage rates; [and] (d) the date or dates on which each of said employees was denied a wage increase."

15. In these circumstances neither respondent nor the Court is in a position to make an informed or reasoned assessment of the relevancy of the salary and wage material sought by the NLRB.

16. This Court should deny enforcement of the subpoena duces tecum until the NLRB particularizes its charge against Biophysics.

FOR A SECOND AFFIRMATIVE DEFENSE

17. The complaint filed by the NLRB in the proceeding now pending before it (and annexed to the application of the NLRB as exhibit b) alleges, at paragraph 13, that Biophysics "issued a disciplinary warning to an employee because of her membership in and activities on behalf of Local 1783." In response to the demand for bill of particulars, the NLRB states that a written disciplinary warning for performing work too slowly was issued to an employee but refuses to describe the statements made by any Biophysics officers, supervisory personnel or employees at the time the disciplinary warning was issued (See paragraph 5 of Biophysics demand and the NLRB's response thereto, exhibits g-12 and g-13 annexed to the application of the NLRB).

18. Despite its failure to provide Biophysics with any information indicating that the disciplinary warning for performing work too slowly was in reaction to the employee's supposed union activities, the NLRB now requires production of "all written disciplinary warnings issued to employees of Biophysics," whether or not they were eligible to vote in the election conducted prior to the proceeding now pending before the NLRB, for calendar years 1972, 1973, 1974, and 1975.

19. In these circumstances neither respondent nor the Court is in a position to make an informed or reasoned assessment of the relevancy of the records concerning written disciplinary warnings sought by the NLRB.

20. This Court should deny enforcement of the subpoena duces tecum until the NLRB particularizes its charge against Biophysics.

FOR A THIRD AFFIRMATIVE DEFENSE

21. Pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), Local 1783, International Brotherhood of Electrical Workers (hereinafter "the union") may intervene in the proceeding now pending before the NLRB. Upon information and belief, even if the union does not formally intervene in the proceeding, the NLRB will consult with union representatives during the course of that proceeding.

22. The subpoena duces tecum served on Biophysics requires the production of Biophysics' payroll records for the years 1972, 1973 and 1974 for all employees whose names appear on the eligibility list for the election conducted

prior to the proceeding now pending before the NLRB.

23. These records are confidential. Production of the aforesaid records in response to the NLRB subpoena duces tecum not only will invade the privacy of Biophysics employees; it may also provide the union with information that the union may use against Biophysics in any election that may result from the pending proceeding.

24. If it is determined that the subpoenaed payroll records must be produced, at the very least, a protective order should be issued by the Court enjoining the NLRB from making copies of the payroll records or any information gleaned from those records available to the union.

FOR A FOURTH AFFIRMATIVE DEFENSE

25. The complaint filed by the NLRB in the proceeding now pending before it (and annexed to the application of the NLRB as exhibit b) alleges that Biophysics engaged in certain unfair labor practices during the period from approximately October 29, 1974 to approximately December 10, 1974. Yet, the subpoena duces tecum served on Biophysics by the NLRB requires the production by Biophysics of records dating from 1972, in the case of written disciplinary warnings and payroll records, and from 1973 in the case of "personnel policies manual or booklet and such other documents, memoranda, or bulletins, which reflect the salary review and wage increase policies of Biophysics ...."

26. Material dating back to 1972 and 1973 is not relevant to the proceeding before the NLRB. Accordingly, the subpoena should not be enforced.

FOR A FIFTH AFFIRMATIVE DEFENSE

27. The subpoena duces tecum served on Biophysics by the NLRB requires the production of all written disciplinary warnings issued to all employees of Biophysics since 1972 whether or not the names of the employees who received such warnings appear on the eligibility list for the election conducted prior to the proceeding now pending before the NLRB.

28. Disciplinary warnings issued to employees whose names do not appear on the aforesaid eligibility list are not relevant to the proceeding before the NLRB. Accordingly, the subpoena should not be enforced.

FOR A SIXTH AFFIRMATIVE DEFENSE

29. The Court's power to enforce the subpoena duces tecum issued by the NLRB is discretionary and may be withheld where enforcement would involve an abuse of the Court's process.

30. Enforcement should be withheld in this case because the NLRB has not come into Court with "clean hands". The NLRB seeks enforcement of the aforesaid subpoena duces tecum in the face of its own adamant refusal to comply with the statutory mandate of the Freedom of Information Act.

31. The Court, sitting as a court of equity, should not grant the NLRB the protection of one federal statute even as the NLRB denies Biophysics the protection of another federal statute.

FOR A FIRST COUNTERCLAIM AGAINST APPLICANT, JOHN C. MILLER AND SIDNEY DANIELSON

32. The NLRB is an agency within the meaning of 5 U.S.C. §§531(1) and 552, provisions of the Freedom of Information Act.

33. Additional defendant on the counterclaim, John C. Miller, is Acting General Counsel of the NLRB. He is responsible for the policies of the NLRB with regard to disclosure under the Freedom of Information Act.

34. Additional defendant on the counterclaim, Sidney Danielson, is Regional Director of Region 2 of the NLRB, which region encompasses New York State. He is responsible for determining whether information requested from Region 2 of the NLRB is privileged from disclosure under the Freedom of Information Act.

35. Jurisdiction of this counterclaim is based on the Freedom of Information Act, 5 U.S.C. §552(a)(4)(B), and the Administrative Procedure Act, 5 U.S.C. §701 et seq., and 28 U.S.C. §1345. Venue is proper under the Freedom of Information Act, 5 U.S.C. §552(a)(4)(B), and 28 U.S.C. §1391(e)(4).

36. On March 25, 1975, the NLRB served a complaint on Biophysics in the proceeding entitled Biophysics Systems, Inc. (Local 1783, International Brotherhood of Electrical Workers), Case No. 2-CA-13562, alleging that Biophysics had

committed certain unfair labor practices.

37. Shortly thereafter, Biophysics determined that it required information in the possession of the NLRB in order adequately to prepare its defense.

38. On June 16, 1975, acting through counsel, Biophysics, therefore, wrote to Region 2 of the NLRB and requested that certain information be provided to it pursuant to 5 U.S.C. §552, 29 U.S.C. §160(b) and §102.117 of the Rules and Regulations of the NLRB, as well as the constitutional principle of due process. (A copy of Biophysics' request for information is annexed to the application of the NLRB in this matter as exhibit g-6).

39. The information that Biophysics requested includes: (a) all exculpatory factual material that the NLRB possesses which might demonstrate that Biophysics did not commit the unfair labor practices with which it is charged; and (b) the statements of witnesses that the NLRB intends to call at the hearing in the proceeding. In an effort to avoid vexatious litigation on the issue and without prejudice to its rights, Biophysics even offered to accept copies of the aforesaid statements with all personal identification removed.

40. By letter dated June 20, 1975, additional defendant Sidney Danielson denied Biophysics' request for production in its entirety. (A copy of Regional Director Danielson's letter is annexed to the application of the NLRB in this matter as exhibit g-7.)

41. Biophysics immediately appealed the decision of Regional Director Danielson to the General Counsel of the NLRB. (A copy of the letter of appeal is annexed to the application of the NLRB in this matter as exhibit q-8).

42. By letter dated July 29, 1975, Robert E. Allen, Director, Office of Appeals in Office of the General Counsel of the NLRB, denied the appeal. In so doing, he stated that "at the direction of, and pursuant to the policies" established by the General Counsel he was the individual "responsible for the determination that the records ... requested are privileged from disclosure under the Freedom of Information Act."

43. None of the records requested by Biophysics are exempt from disclosure under 5 U.S.C. §552 or 29 U.S.C. §160(b). Biophysics has exhausted its administrative remedies.

44. The Regional Director and the Office of the General Counsel acted arbitrarily, capriciously and with the intent of evading the purpose and requirements of the Freedom of Information Act when they denied Biophysics' request for information.

45. Biophysics is entitled to an order requiring the NLRB and the additional defendants on the counterclaim immediately to produce the documents that Biophysics requested by letter dated June 16, 1973.

FOR A SECOND COUNTERCLAIM AGAINST APPLICANT, JOHN C. MILLER AND SIDNEY DANIELSON.

46. Biophysics repeats and realleges each and every allegation contained in paragraphs 32 through 44 as though fully set forth herein.

47. Biophysics has asserted three affirmative defenses in the proceeding now pending before the NLRB (Copies of its answer and amended answer in that proceeding are annexed to the application of the NLRB as exhibits c-1 and c-2). Information that it requested from the NLRB under the Freedom of Information Act will assist it in presenting those defenses at the hearing in the proceeding before the NLRB.

48. Biophysics will be denied a fair hearing and an opportunity fully to defend itself against the charge that it has committed certain unfair labor practices unless it receives the information that it requested from the NLRB.

49. Biophysics will be irreparably harmed if the pending proceeding before the NLRB goes forward before its claims under the Freedom of Information Act can be finally resolved.

50. The Court should stay the proceeding before the NLRB until Biophysics' claims under the Freedom of Information Act can be finally resolved.

FOR A THIRD COUNTERCLAIM
AGAINST APPLICANT, JOHN C.
MILLER AND SIDNEY DANIELSON

51. Biophysics repeats and realleges each and every allegation contained in paragraphs 32 through 44, 47, 48 and 49 as though fully set forth herein.

52. Biophysics first requested the NLRB to produce information under the Freedom of Information Act on June 16, 1975. The NLRB did not serve the subpoena duces tecum that it now seeks to enforce until almost one month later, on July 9, 1975.

53. It would be inequitable and contrary to both the purposes and provisions of the Freedom of Information Act for the Court to rule on the NLRB's application to enforce the subpoena duces tecum without also ruling on Biophysics' application under the Freedom of Information Act.

54. Accordingly, the Court should advance Biophysics' counterclaims on the court docket as authorized by 5 U.S.C. §552(a)(4)(D) and resolve those claims at the same time that it rules on the NLRB's application to enforce its subpoena duces tecum.

FOR A FOURTH COUNTERCLAIM
AGAINST APPLICANT, JOHN C.
MILLER AND SIDNEY DANIELSON

55. Biophysics repeats and realleges each and every allegation contained in paragraphs 32 through 44, 47, 48, and 49 as though fully set forth herein.

56. The NLRB not only has failed to provide Biophysics with any of the information that it requested

in its letter dated June 16, 1975; it also has failed to particularize the charges that it has asserted against Biophysics.

57. Unless the charges are particularized and the information is supplied, Biophysics will be denied its right to a fair hearing before the NLRB in violation of its rights to due process under the Fifth Amendment to the United States Constitution.

FOR A FIFTH COUNTERCLAIM
AGAINST APPLICANT, JOHN
C. MILLER AND SIDNEY DANIELSON

58. Biophysics repeats and realleges each and every allegation contained in paragraphs 32 through 44, 47, 48, and 49 as though fully set forth herein.

59. The information that Biophysics has requested from the NLRB includes materials containing exculpatory facts that may show that Biophysics did not commit the unfair labor practices with which it has been charged.

60. Due process requires, at the very least, that such information be made available to Biophysics.

61. Unless such information is supplied, Biophysics will be denied its rights under the Fifth Amendment to the United States Constitution and the United States Supreme Court decision in Brady v. Maryland, 373 U.S. 83 (1963).

FOR A SIXTH COUNTERCLAIM
AGAINST APPLICANT, JOHN
C. MILLER AND SIDNEY DANIELSON

62. Biophysics repeats and realleges each and every allegation contained in paragraphs 32 through 44,

47, 48, 49 and 56 through 61.

63. Biophysics has a substantial constitutional claim against the NLRB arising from the failure of the NLRB to provide Biophysics with information, including exculpatory statements, that Biophysics has requested.

64. The Court should stay the proceeding before the NLRB until Biophysics' claims that its constitutional rights have been violated can be finally resolved.

WHEREFORE, Biophysics prays that the Court:

A. Deny the application of the NLRB to enforce the subpoena duces tecum received by Biophysics on July 9, 1975; or, in the alternative, enjoin the NLRB from making copies of Biophysics' payroll records or any information gleaned from those records available to the union;

B. Enjoin the NLRB, pendente lite, from proceeding with a hearing in Biophysics Systems Inc. (Local 1783, International Brotherhood of Electrical Workers), Case No. 2-CA-13562;

C. Assign Biophysics' claims under the Freedom of Information Act for hearing and trial or for argument at the earliest practicable date and expedite the matter in every way, as required by 5 U.S.C. §552 (a)(4)(D);

D. Enjoin the NLRB, John C. Miller, Sidney Danielson and their agents, servants and employees from withholding the records requested by Biophysics and order them to furnish copies of those records to Biophysics forthwith;

E. Award Biophysics its attorneys fees and other

litigation costs, as authorized by 5 U.S.C. §552 (a)(4)(E);

F. Declare that the records that Biophysics requested from the NLRB were improperly withheld and issue a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously, as authorized by 5 U.S.C. §552 (a)(4)(F); and

G. Award such other and further relief as the Court may deem just and proper.

Dated: New York, New York
October , 1975

PROSKAUER ROSE GOETZ & MENDELSOHN

By_____
Attorneys for Biophysics Systems, Inc.
300 Park Avenue
New York, New York

(212) 593-9000

ABIGAIL COOLEY, Assistant General
Counsel for Special Litigation
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- and -

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ATTORNEYS FOR APPLICANT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD, Applicant,	)	
v.	)	Civil Action No. M-18-304
BIOPHYSICS SYSTEMS, INC., Respondent.	)	

NOTICE OF MOTION

TO: Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, N.Y.

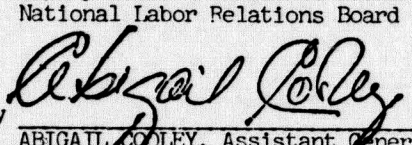
Please take notice, that upon the pleadings herein, the annexed statement of material facts and upon the accompanying memorandum of law, the undersigned will move this Court, on the 27th day of January, 1976, at 10:30 a.m. or as soon thereafter as counsel may be heard (1) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the counterclaims on the ground that the counterclaims fail to state a claim upon which relief can be granted, and (2) in the alternative, pursuant to Rule 56(c) of the Federal Rules, for an order granting summary judgment in favor

of defendants on the counterclaims and for such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D.C.
this 15th day of January, 1976.

By 

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Co-counsel: Eric Moskowitz (Ext. 9274)

- and -

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ATTORNEYS FOR APPLICANT AND ADDITIONAL
DEFENDANTS ON COUNTERCLAIMS

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD,	:	
Applicant,	:	
v.	:	No. M-18-304
BIOPHYSICS SYSTEMS, INC.,	:	
Respondent.	:	
and	:	
BIOPHYSICS SYSTEMS, INC.,	:	
Respondent,	:	
v.	:	
JOHN S. IRVING, General Counsel of the National Labor Relations Board, and WINIFRED MORIO, Regional Director of the National Labor Relations Board, Region 2,	:	
Additional Defendants on the Counterclaims.	:	

MOTION TO DISMISS THE COUNTERCLAIM
OR, IN THE ALTERNATIVE, FOR SUMMARY
JUDGMENT

1. Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the National Labor Relations Board, applicant herein, and

John S. Irving, General Counsel, and Winifred Morio, Regional Director of Region 2 of the National Labor Relations Board, additional defendants on counterclaims, move to dismiss the counterclaims herein on the following grounds:

(a) Insofar as respondent seeks review of the General Counsel's Response in Part and Opposition in Part to Respondent's Demand for a Bill of Particulars in the Board proceedings, the Counterclaim must be dismissed for lack of subject matter jurisdiction.

(b) Insofar as respondent seeks review of the General Counsel's refusal to permit pre-trial discovery in the Board proceedings, the Counterclaim must be dismissed for lack of subject matter jurisdiction.

(c) Insofar as respondent seeks production of documents pursuant to the Freedom of Information Act 5 U.S.C. §552, et seq., as amended, 88 Stat. 1563, the Counterclaim fails to state a claim upon which relief can be granted.

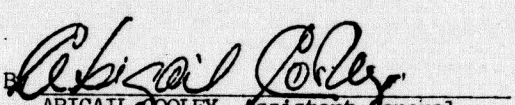
2. Alternatively, the National Labor Relations Board and its General Counsel and Regional Director move for summary judgment on the Counterclaim, pursuant to Rules 12(c) and 56 , Federal Rules of Civil Procedure.

WHEREFORE, the National Labor Relations Board, its General Counsel and Regional Director respectfully request that their motion to dismiss the Counterclaim, or, in the alternative, for summary judgment be granted.

Respectfully submitted,

ELLIOTT MOORE
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D. C.
this 15th day of January,
1976.

By 
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- and -

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ATTORNEYS FOR APPLICANT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD, Applicant, v. BIOPHYSICS SYSTEMS, INC., Respondent.	)	Civil Action No. M-18-304

STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO
GENUINE ISSUE

1. On December 18, 1974, Local 1783, International Brotherhood of Electrical Workers, AFL-CIO (hereafter "the Union") filed an unfair labor practice charge (Application, Exh. a) in Region Two of the National Labor Relations Board (hereafter "the Board").

2. The case was investigated by the Regional Office and on March 25, 1975, Sidney Danielson, then Regional Director of Region Two, issued a complaint (Application, Exh. b) alleging violations of the National Labor Relations Act (hereafter "the Act"). The hearing on the above allegations was rescheduled from May 5, to May 27, 1975 (Application, Exh. d-1). Thereafter, the hearing was further postponed and is

now scheduled for February 10, 1976 (Application, Exh. d-6).

3. On June 13, 1975, respondent Biophysics Systems, Inc. (hereafter "the Company") filed a demand with the General Counsel for a bill of particulars (Application, Exh. g-12).

4. By letter of June 16, 1975 to the Regional Director of Region Two, the Company requested, pursuant to the Freedom of Information Act, 5 U.S.C. §552 as amended (hereafter "the FOIA"), 29 U.S.C. Section 160(b) and Section 102.117 of the Board's Rules and Regulations, copies of affidavits and signed statements of all the witnesses whom counsel for the General Counsel intended to call at the unfair labor practice hearing; copies of all union authorization cards signed by Company employees and all notes, memoranda, correspondence, papers, reports, inter-office communications, minutes of meetings, and all other records and documentary material obtained by the General Counsel during its investigation which are inconsistent with, or in conflict with the charges alleged in the complaint (Application, Exh. g-6).

5. The Company's request for affidavits and other documents was treated as having been made under the FOIA, and on June 20, 1975, the Regional Director denied the request on grounds that the information was privileged from disclosure by Exemptions 5 and 7(A), (C) and (D) of the FOIA (Application, Exh. g-7).

6. On July 2, 1975, counsel for the General Counsel issued a Response in Part and Opposition in Part to the Company's request for a bill of particulars (Application, Exh. g-13).

7. On July 2, 1975, the Company filed an appeal from the General Counsel's denial of its FOIA request (Application, Exh. g-8).

8. On July 7, 1975 the Board issued a subpoena duces tecum (Application, Exh. g-5) to the Company directing the Company to produce certain records at the Administrative Law Judge hearing in the unfair labor practice case.

9. The Company filed a petition to revoke the subpoena duces tecum (Application, Exh. g-1) on July 10, 1975 with the Regional Director of Region Two.

10. On July 15, 1975, counsel for the General Counsel filed with the Regional Director a statement in opposition to the Company's petition to revoke the subpoena duces tecum (Application, Exh. h).

11. On July 18, 1975, Administrative Law Judge Arthur Leff denied the Company's petition to revoke the subpoena duces tecum (Application, Exh. j), and denied the Company's demand for a bill of particulars to the extent not voluntarily complied with by the General Counsel (Application, Exh. 1).

12. On July 29, 1975, the General Counsel denied the Company's July 2, 1975 FOIA appeal for substantially the reasons set forth by the Regional Director (Application, Exh. m).

13. By letter of August 13, 1975 to the Regional Director of Region Two, the Company refused to obey the subpoena duces tecum (Application, Exh. n).

14. On January 7, 1976, the Board applied to this Court for an order compelling the Company to obey the subpoena duces tecum issued by the Board on July 7, 1975.

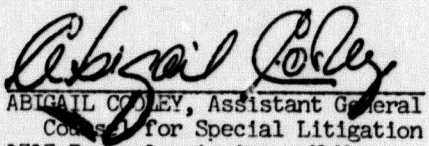
15. In response to the Board's January 7, 1976 Application, the Company filed its Answer and Counterclaims on January 7, 1976 in which it avers that the information originally sought by it on June 16, 1975 is required to be disclosed.

16. On January 9, 1976 the Board filed with the Court a Motion to Sever the Company's Counterclaims from the proceedings regarding the Board's application for subpoena enforcement.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D.C.
this 15th day of January, 1976.

By 
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1717 Pennsylvania Ave., N.W.
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Co-counsel: Eric Moskowitz (Ext. 9274)

- and -

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STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

AMY NORA GLADSTEIN, being duly sworn, deposes and says:

1. I am an attorney with the National Labor Relations Board, Region 2, 26 Federal Plaza, Room 3614, New York, New York 10007. As part of my duties, I investigated the unfair labor practice charge filed by Local 1783, IBEW, against Biophysics Systems, Inc. Case No. 2-CA-13562.

2. During the course of my investigation of the charge, I spoke to 11 individuals who possessed knowledge concerning various aspects of the case.

3. At the commencement of my interviews with eight of these individuals, I informed them in substance that any written statement they might wish to make would be treated by the NLRB as confidential and would be revealed only in the event that there was a trial of the unfair labor practice charge, in which case, if they were called to testify, and if the Respondent requested their affidavit it would be furnished to the Respondent for the purposes of cross-examination. The making of this assurance is the normal procedure followed by me in the investigation of an unfair labor practice charge.

4. One of the individuals to whom I made no assurances of confidentiality subsequently submitted a statement to me concerning the case. The remaining two individuals in this group of three neither gave me a statement nor submitted one on their own.

5. With respect to the eight individuals described above in paragraph 3, I personally obtained statements from four of them. (Another one of these individuals gave a statement to another Board Agent, as described in more detail in paragraph 6.) To each of the four individuals from whom I obtained affidavits I reiterated their confidential nature at the time the

affidavit was sworn and subscribed to.

6. I had several conversations with the individual referred to above in paragraph 5 whose affidavit was taken by another Board Agent. Prior to the taking of the affidavit this individual had failed to keep two appointments with me concerning the case. I subsequently reached the individual by telephone and asked the individual why the appointments were not kept. The individual expressed concern that neither the Charging Party nor the Respondent should learn of either the fact, or the substance, of any testimony given to the Board. Because I felt, on the basis of this conversation, that this individual was a reluctant witness and would not provide any information without further assurances of confidentiallity, I assured the individual that the National Labor Relations Board would not disclose either the fact that (s)he had testified or the contents of the statement, unless, and until, there was a trial of the case and the individual was called as a witness, in which case the statement would be furnished to the Respondent, if requested, for the purposes of cross-examination. This individual then agreed to give a statement, which was taken by another Board Agent.

7. Three of the eight individuals described above in paragraph 3 were interviewed by me but did not give sworn affidavits. I made further assurances of confidentiality to one of these individuals, who initially refused to even speak with me and who was clearly a reluctant witness. I assured this individual that any statement made would be strictly confidential and would not be revealed unless, and until, there was a trial of the underlying charge and the individual was called as a witness, in which case the statement would be furnished to the Respondent if requested for the purposes of cross-examination. This individual then agreed to give the Board a statement, but refused to sign it.

I have read the above affidavit and swear that it is true to the best of my knowledge and belief.

AMY N. GLADSTEIN

Sworn and subscribed to before me
this 2nd day of December, 1975

[illegible]
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-1769250
Qualified in Nassau County
Term Expires March 30, 1977

ABIGAIL COOLEY, Assistant General
Counsel for Special Litigation
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- and -

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ATTORNEYS FOR APPLICANT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD, Applicant, v. BIOPHYSICS SYSTEMS, INC., Respondent.	)	Civil Action No. M-18-304

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Board's notice of motion, motion to dismiss the counterclaim or, in the alternative, for summary judgment, and statement of material facts as to which there is no genuine issue, in the above-captioned case, has this day been served by first-class mail upon the following counsel at the address listed below:

Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, N.Y.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D.C.
this 15th day of January, 1976.

By _____
ABIGAIL COOLEY, Assistant General
Counsel for Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D. C. 20570
Telephone: (202) 254-9221

Served 11/23/76 by hand
Mailed 11/23/76
Received FILED 11/26/76
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -X

NATIONAL LABOR RELATIONS BOARD, : Civil Action M-18-304

Applicant, : AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS

-against- : COUNTERCLAIMS OR, IN THE ALTERNATIVE, FOR SUMMARY

BIOPHYSICS SYSTEMS, INC. : JUDGMENT.

Respondent. :

- - - - - - - - - - - - - - - - - - -X

STATE OF NEW YORK:
ss.:
COUNTY OF NEW YORK:

LOIS D. THOMPSON, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Proskauer Rose Goetz & Mendelsohn, counsel for Respondent, Biophysics Systems, Inc. (hereafter "Biophysics"), in the above captioned matter. I submit this affidavit in opposition to the motion of the National Labor Relations Board (hereafter "NLRB") for an order dismissing Biophysics' counterclaims or, in the alternative, for summary judgment. I am fully familiar with the facts set forth herein.

2. Previous affidavits already submitted to this court detail the nature and procedural history of the dispute between Biophysics and the NLRB. Therefore, the affidavit will discuss only those facts pertinent to Biophysics' claims under the Freedom of Information Act.

3. By letter dated June 16, 1975, Biophysics requested certain specific information from the NLRB. A copy of that letter is annexed to the NLRB's Application for Order Requiring Obedience to Subpoena Duces Tecum (hereafter "Application") as Exhibit g-6. Biophysics requested copies of all affidavits or signed statements which the NLRB had obtained from witnesses whom it anticipated would be called to testify during the hearing into the unfair labor practices that Biophysics allegedly has committed. Biophysics indicated that it would accept copies of the affidavits and statements with all personal identification removed. In addition, Biophysics requested copies of all the authorization cards that had been signed by its employees which indicated that the employees selected Local 1783 of the International Brotherhood of Electrical Workers as their collective bargaining representative. Finally, Biophysics requested copies of all documents within the custody or control of the NLRB that were obtained during the course of its investigation into the alleged unfair labor practices and which were inconsistent or conflicted with the charges alleged in the NLRB complaint, or which showed that Biophysics had not committed the unfair labor practices with which it had been charged.

4. By letter dated June 20, 1975, the Regional Director of Region 2 of the NLRB denied Biophysics' request in its entirety. (See Exhibit g-7 to the Application). Subsequently, Biophysics appealed the denial of its request to the General Counsel of the NLRB. Its appeal was denied.

(See Exhibits g-8 and m to the Application).

5. In denying Biophysics' request, both the Regional Director and General Counsel took the position that all of the documents and information sought were exempt from production under 5 U.S.C. §§552(b) (5) and (7), the relevant portions of the Freedom of Information Act. Neither official gave any indication that the NLRB had reviewed its files to determine whether any portions of the documents sought were "reasonably segregable" and could be provided to Biophysics after deletion of the portions allegedly exempt under the statute. Yet, the Freedom of Information Act recently has been amended specifically to mandate such a procedure. In addition, Biophysics expressly put the NLRB on notice of the fact that the agency could follow such a procedure by indicating that, if necessary, it would accept statements and affidavits with personal identification removed.

6. Biophysics believes that the NLRB's bald denial of its request flies in the face of the purposes of the Freedom of Information Act, particularly as that Act has been amended.

7. The procedures employed by the NLRB in reviewing and responding to requests under the Freedom of Information Act confirm Biophysics' belief that the NLRB fails to take its obligations under the Act seriously.

8. Biophysics recently has discovered that the letter which the Regional Director wrote to it denying its request for information was taken verbatim or almost verbatim from the

Appendix to the NLRB General Counsel's Guidelines for processing requests under the Freedom of Information Act (hereafter "Guidelines"). A copy of the appendix to the Guidelines is annexed hereto as Exhibit 1.

9. Still more recently, while preparing its response to the instant motion, Biophysics discovered that the Regional Director of Region 2 has used the paragraphs taken verbatim from the Guidelines and included in the letter to Biophysics on at least one other occasion. Those same paragraphs appear in the Regional Director's reply to the requests for information of The Title Guarantee Company. Similarly, Biophysics has discovered that the General Counsel of the NLRB used identical language in denying the Biophysics appeal and the Title Guarantee appeal. The relevant correspondence is part of this court's file in The Title Guarantee Company v. National Labor Relations Board, S.D.N.Y., Docket No. 75 Civ. 3828 (LG). Those documents also are annexed hereto as exhibits 2 and 3. As is set forth at greater length in the accompanying memorandum of law, Judge Gagliardi ruled that the NLRB wrongfully withheld information from The Title Guarantee Company and issued an order requiring that the requested information be delivered to the company.

10. Biophysics recognizes the value of centralized and uniform procedures within a government agency; however, the procedures followed by the NLRB, as reflected in the Guidelines and letters incorporating those Guidelines, appear to constitute more than a uniform approach to a common problem.

Biophysics believes that the NLRB has adopted a rigid policy of denying all requests for information in circumstances like those before this court.

11. Biophysics' belief that the NLRB responds to requests for information under the Freedom of Information Act with a knee-jerk denial is confirmed by its treatment of the company's request for copies of authorization cards. In his letter denying Biophysics' request for information, then Regional Director Sidney Danielson rejects the company's request for such cards with the succinct statement "I find that the 'copies of all authorization cards...', which you have requested, also are privileged from disclosure under Exemption (7)(A)(C) and (D)." Exemption (7) concerns "investigatory records compiled for law enforcement purposes."

12. Such cards simply cannot fall within that category since they were prepared and submitted to the NLRB long before the investigation into the alleged unfair labor practices commenced. I am informed that such cards were obtained by Local 1783 of the International Brotherhood of Electrical Workers during its attempt to organize employees of Biophysics and establish its right to represent them.

13. It is my opinion that even the staff of the NLRB recognizes that the authorization cards at issue do not constitute part of the agency's "investigatory records compiled for law enforcement purposes." Approximately two weeks ago I had a telephone conversation with an attorney in

the offices of Region 2 of the NLRB. At that time, he informed me that the NLRB maintains two separate files relating to Biophysics. One of these files is known as the Representation file. It apparently contains material relating to Local 1783's efforts to organize Biophysics' employees. A second file is known as the Complaint file. This file apparently contains material relating to the unfair labor practices proceeding that the NLRB has instituted against Biophysics. The attorney informed me that the authorization cards were not in the Complaint file. He stated that they were undoubtedly in the Representation file.

14. While I do not believe that documents that have been placed in the NLRB Complaint file should automatically be deemed "investigatory records compiled for law enforcement purposes", I am certain that documents that the NLRB does not even place in the Complaint file, and which it obtained in advance of any investigation, cannot possibly be exempt from production under the Freedom of Information Act.

15. The NLRB's rigid approach to the Freedom of Information Act also is illustrated by the affidavit of Amy Nora Gladstein which is Attachment C to the NLRB's Motion to Dismiss the Counterclaims or, in the Alternative, for Summary Judgment. The NLRB argues that the statements referred to in that affidavit are exempt from production under the Freedom of Information Act's exemption relating to inter-agency or intra-agency memorandums or letters. Yet,

it is readily apparent that a statement taken from a Biophysics employee is neither a letter nor a memorandum, much less one that is written between or within agencies.

16. The examples of the NLRB's approach to the documents sought by Biophysics set forth above not only illustrate the agency's rigid resistance to production under the Freedom of Information Act; they also illustrate the degree to which the NLRB's motion to dismiss or for summary judgment lacks merit. There are major issues of fact relating to the nature of the documents at issue which remain to be resolved. Summary judgment thus is inappropriate. Those issues of fact stem from the rights which the Freedom of Information Act accords to all members of the public, including Biophysics. Since Biophysics has exhausted its administrative remedies and has failed to obtain the information that it is requesting under the Freedom of Information Act, it is entitled to bring suit in federal court. Its counterclaims, which set forth its assertions under the Freedom of Information Act, state a claim for relief and therefore should not be dismissed.

17. For the foregoing reasons Biophysics respectfully requests that this court deny the NLRB's motion to dismiss the counterclaims or, in the alternative, for summary judgment.

Lois D. Thompson
LOIS D. THOMPSON

Sworn to before me this
23 day of January, 1976

Notary Public

LAWRENCE S. GREENE
NOTARY PUBLIC, State of New York
No. 1[illegible]
Qualified in Westchester County
Commission Expires March 30, 1977

Exhibit 1

this Appendix has been pre, ed to assist all by providing easy access to materials relevant to the claim of FOIA exemptions, these exemptions should not be automatically applied. Rather, in each instance of a request for information, careful review of each requested record should be made in order to determine whether an exemption should be claimed. Only upon such a determination do the suggested language examples below become useful.

These materials are examples of the language which the Freedom of Information Officer in Washington has used in explaining the rationale of exemptions claimed for various records in the Office of the General Counsel in Washington, and also some other relevant aspects of responses. (Appropriate modifications have been made as a result of the Supreme Court's decision in N. L. R. B. v. Sears, Roebuck and Co., ___ U.S. ___, 89 LRRM 2001.)

A table of contents is provided to facilitate reference to the paragraphs. The paragraphs involving exemptions are arranged according to the types of records requested and the language which has been used in explaining the assertion of particular exemptions from disclosure as to those records. While, as noted above, particular exemptions which might apply to privilege a requested record from disclosure can only be determined after examining the requested record, this index, in the interest of completeness, identifies the rationale for each exemption which has been applied to particular requested records within the identified categories. In this respect, it should be noted that where an intra-agency record within Exemption 5 has been found to contain references to individuals which cause the record to be viewed as also within Exemption 7(C), the language of paragraph 7A-3 has been used in explaining the rationale for the applicability of Exemption 7(A) to that aspect of the record which brings it within Exemption 7(C). The paragraphs identified by the letters A - F are examples of language used concerning various relevant aspects of responses.

INTRODUCTION TO RESPONSES TO FOIA REQUESTS

It is important to reemphasize that the basic thrust of the FOIA is to provide information to the public, not to withhold it. Balanced with this principle, however, is the legitimate need to protect those materials gathered by us in our law enforcement function. Accordingly, although

TABLE OF CONTENTS TO RESPONSES TO FOIA REQUESTS

Responsibility and notice of right to appeal	A
Segregability of factual portions	B
Non-segregability of factual portions	
Intra-agency document	C
Other investigatory documents	D
General counsel policy regarding complaint authorizing advice/appeals memos	
Closed case	E
Open case	F

EXEMPTIONS

Records	2	4	5	6	7(A)	7(C)	7(D)
Advice and appeals memoranda authorizing issuance of complaint in open case	2-1		5-1		7A-1 1/	7C-1	7D-1
Marginal notations on FIR; RD's instructions to issue complaint	2-2		5-2		7A-2 1/	7C-2	7D-2
Parties' statements of facts; Affidavits/statements taken by Bd. agents or submitted by parties or potential witnesses during an investigation; Parties' list of names of witnesses and summary of their testimony; Material of parties submitted during investigation					7A-3	7C-3	7D-3
Bd. agents notes; Memoranda to the file; Legal memoranda; Final investigation reports			5-3		7A-4 1/	7C-4	7D-4
Advice submission memoranda; Comment on appeal; Bd. agents list of witnesses and summary of their testimony			5-4		7A-5 1/	7C-5	7D-5

1/ See paragraph three of "Introduction to Responses to FOIA Requests."

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Written communications between Bd. agents and parties or potential witnesses; Oral communications between Bd. agents and parties or potential witnesses which have been reduced to writing					7A-6	7C-6	7D-6
Recommendation for approval of election agreement; Recommendation to approve withdrawal request; Hearing Officer's representation hearing report of D & D or D & O			5-5		7A-7		
Excelsior list; List of eligible voters				6-1(a) 6-1(b)	7A-8	7C-7	
Information regarding interim earnings and employment of discriminatees; Social security earnings reports of discriminatees		4-1		6-2	7A-9	7C-8	
Showing of interest				6-3	7A-10	7C-9	

A The undersigned is responsible for the determination that the records you have requested are privileged from dislosure under the Freedom of Information Act. You may obtain a review of that determination under the provisions of Section 102.117 (c) (2) (ii) of the Board's rules by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D.C., 20570, within 20 days (excluding Saturdays, Sundays and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

B The enclosed portions of the requested record are being provided to you because they were found to be reasonably segregable from the exempt portions of the records.

C Also, there are no "factual" portions of this memorandum which are not inextricably intertwined with policy-making processes, or which can be severed from the exempt portions of the memorandum without compromising the private remainder of the document. Environmental Protection Agency v. Mink, 410 U.S. 73; Soucie v. David, 448 F. 2d 1067 (C.A.D.C.).

D Further, deletion of names from these statements would not preserve the interests recognized by exemptions 7(A), (C), and (D) since disclosure of the material contained therein would, itself, constitute invasions of personal privacy, reveal confidential sources and, consequently, interfere with enforcement proceedings under the considerations set forth above. Deletion of portions sufficient to prevent an unwarranted invasion of personal privacy or prevent disclosure of a confidential source would result in a record so fragmented as to be incoherent and not responsive to your request.

E Enclosed is a copy of the advice memorandum, which authorized complaint, that you requested. This memorandum was prepared by the Division of Advice to provide guidance to the Regional Office in the disposition of the case. It is being provided to you under the General Counsel's policy of making such documents publicly available after the closing of the respective case.

F Although the General Counsel has, in the exercise of his discretion, adopted a policy of making advice and appeals memoranda authorizing complaint publicly available after the closing of the respective case, i.e., once a Board decision has issued, there has been full compliance with a settlement of the case, or the case has otherwise been closed under Agency procedures, the memorandum you request may not now be made available under his policy since the case is not closed.

2-1 Exemption 2 qualifies the extent to which "administrative staff manuals and instructions to staff that affect a member of the public" must be made available, under Section (a) (2) (C) of the Freedom of Information Act. It is the position of this Agency that this exemption privileges from disclosure those parts of advice memoranda which contain case-handling instructions since they are instructions to staff which establish internal operating guidelines and procedures for the investigation, trial, and settlement of cases.

4-1 The material requested is privileged from disclosure under exemption 4 of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (4), which exempts from disclosure trade secrets and commercial and financial information obtained from a person and privileged or confidential. It is the position of this Agency that this exemption is not limited to the classes of information specifically enumerated but also encompasses other records obtained by the Agency from a person in the investigation of a case with the understanding that, unless the records are introduced in evidence in a formal proceeding, they will not be released either publicly or to other parties or persons, and will be returned to the person furnishing them after completion of the investigation and the closing of the case.

5-1 Advice memoranda authorizing complaint are privileged from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (5), since they are intra-agency memoranda which would not be available by law to a party other than an agency in litigation with this Agency. The legislative history of Exemption 5 makes it clear that this subsection of the Freedom of Information Act was designed to protect and promote the objectives of fostering frank deliberation and consultation within the Agency in the policy-making stage, and to prevent a premature disclosure of policy which could disrupt agency procedure. Thus, Exemption 5 is based upon and preserves the privilege against disclosure of intra-agency and inter-agency memoranda reflecting the deliberative and consultative process so that communications between those involved in the process might be uninhibited. Advice memoranda authorizing complaint reflect the views of the General Counsel and his staff concerning prosecutorial policies in the processing of unfair labor practice cases. Since they discuss strengths and weaknesses of the evidence, analyze various legal theories, and suggest litigation strategies and settlement possibilities, such memoranda clearly reflect the deliberative and consultative process of the Agency which Exemption 5 protects from forced disclosure. N.L.R.B. v. Sears, Roebuck and Co., No. 73-1233 (Sup. Ct., April 28, 1975).

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5-2 Regional Directors' instructions to issue complaint are privileged from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (5), since they are intra-agency memoranda which would not be available by law to a party other than an agency in litigation with this Agency. The legislative history of Exemption 5 makes it clear that this subsection of the Freedom of Information Act was designed to protect and promote the objectives of fostering frank deliberation and consultation within the Agency in the policy-making stage, and to prevent a premature disclosure of policy which could disrupt agency procedure. Thus, Exemption 5 is based upon and preserves the privilege against disclosure of intra-agency and inter-agency memoranda reflecting the deliberative and consultative process so that communications between those involved in the process might be uninhibited. These instructions reflect the views of Board agents concerning prosecutorial policies in the processing of unfair labor practice cases. Since they discuss strengths and weaknesses of the evidence, analyze various legal theories, and suggest litigation strategies and settlement possibilities, such memoranda clearly reflect the deliberative and consultative process of the Agency which Exemption 5 protects from forced disclosure. See, Environmental Protection Agency v. Mink, 410 U.S. 73; Montrose Chemical Corp. v. Train, 491 F. 2d 63 (C.A.D.C.).

5-3 Legal memoranda are privileged from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (5), since they are intra-agency memoranda which would not be available by law to a party other than an agency in litigation with this Agency. The legislative history of Exemption 5 makes it clear that this subsection of the Freedom of Information Act was designed to protect and promote the objectives of fostering frank deliberation and consultation within the Agency in the policy-making stage, and to prevent a premature disclosure of policy which could disrupt agency procedure. Thus, Exemption 5 is based upon and preserves the privilege against disclosure of intra-agency and inter-agency memoranda reflecting the deliberative and consultative process so that communications between those involved in the process might be uninhibited. Legal memoranda reflect the views of Board agents concerning prosecutorial policies in the processing of unfair labor practice cases. Since they discuss strengths and weaknesses of the evidence, analyze various legal theories, and suggest litigation strategies and settlement possibilities, such memoranda clearly reflect the deliberative and consultative process of the Agency which Exemption 5 protects from forced disclosure. See, Environmental Protection Agency v. Mink, 410 U.S. 73; Montrose Chemical Corp. v. Train, 491 F. 2d 63 (C.A.D.C.)

5-4 Advi ission memoranda are privileged from disclo der Exemption 5 of the Freedom of Information A U.S.C. Section 552(b)(5), since they are intra-agenc memoranda which would not be available by law to a party other than an agency in litigation with this Agency. The legislative history of Exemption 5 makes it clear that this subsection of the Freedom of Information Act was designed to protect and promote the objectives of fostering frank deliberation and consultation within the Agency in the policy-making stage, and to prevent a premature disclosure of policy which could disrupt agency procedure. Thus, Exemption 5 is based upon and preserves the privilege against disclosure of intra-agency and inter-agency memoranda reflecting the deliberative and consultative process so that communications between those involved in the process might be uninhibited. These memoranda reflect the views of Board agents concerning prosecutorial policies in the processing of unfair labor practice cases. Since they discuss strengths and weaknesses of the evidence, analyze various legal theories, and suggest litigation strategies and settlement possibilities, such memoranda clearly reflect the deliberative and consultative process of the Agency which Exemption 5 protects from forced disclosure. See Environmental Protection Agency v. Mink, 410 U.S. 73; Montrose Chemical Corp. v. Train, 491 F. 2d 63 (C.A.D.C.).

5-5 Exemption 5, specifically exempts from disclosure intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Agency. It is clear from the legislative history of that exemption that it was intended to protect from disclosure the deliberations and advice of agency staff and personnel, as well as the "documents or information which ... [the agency] has received or generated before it completes the process of ... issuing an order, decision, or regulation." H. Rept. 1497, 89th Congress, 2d Sess., p. 10. See also, Attorney General Memorandum on the Public Information Section of the Administrative Procedure Act, U.S. Department of Justice, June 1967, p. 35. "[B]oth Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decision maker in arriving at his decision, which are exempt from disclosure, and post-decisional memoranda setting forth the reasons for an Agency decision already made, which are not." Renegotiation Board v. Grumman Aircraft, No. 73-1316, decided April 28, 1975, 42 U.S.L.W. 4502, 4507. Accord: N.L.R.B. v. Sears, Roebuck and Co., U.S. Sup. Ct. No. 73-1233, decided April 28, 1975, 43 U.S.L.W. 4491, 4497-4498. The documents you request relate to the deliberations of the Regional Director in the predecisional stage of the case, and thus are protected from disclosure by Exemption 5.

6-1(a) Your request for a list of names and addresses of eligible voters submitted by the employer in the above captioned representation proceeding must be denied. The list is privileged from disclosure under exemption 6 of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(6). This exemption operates to privilege from disclosure personnel and medical files and similar files not only of Agency personnel but also the files of other persons which might be in the possession of the Agency in the course of processing a case. Moreover, exemption 6 requires the Board to balance the right of privacy of affected individuals against the right of the public to be informed. Cf. Getman v. N.L.R.B., 450 F. 2d 670 (C.A.D.C.). The neutrality of the Board, which serves the public interest, would be breached by providing such a list other than under the circumstances outlined in the Board's order in the particular case. If the Board were to provide you with such a list, it would appear that the Board was assisting future organizing efforts, which would result in less cooperation from employers in supplying such lists. Since you have submitted no showing of public interest which would, I find, overcome the privacy right of individuals, their right of privacy must prevail.

6-1 (b) Your request for a list of eligible voters in the above captioned representation proceeding must be denied. The list is privileged from disclosure under exemption 6 of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (6). This exemption operates to privilege from disclosure personnel and medical files and similar files not only of Agency personnel but also the files of other persons which might be in the possession of the Agency in the course of a processing a case. Moreover, exemption 6 requires the Board to balance the right of privacy of affected individuals against the right of the public to be informed. Cf. Getman v. N.L.R.B., 450 F. 2d 670 (C.A.D.C.). Since you have submitted no showing of public interest which would,

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I find, overcome the privacy right of individuals, their right of privacy must prevail.

6.2 Your request for documents showing discriminatees' interim earnings must be denied. Such documents are privileged from disclosure under exemption 6 of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (6). This exemption operates to privilege from disclosure personnel and medical files and similar files not only of Agency personnel but also the files of other persons which might be in the possession of the Agency in the course of processing a case. Moreover, exemption 6 requires the Board to balance the right of privacy of affected individuals against the right of the public to be informed. Cf. Getman v. N.L.R.B., 450 F. 2d 670 (C.A.D.C.). Since you have submitted no showing of public interest which would, I find, overcome the privacy right of individuals, their right of privacy must prevail.

6-3 Your request for documents revealing the showing of interest must be denied. Such documents are privileged from disclosure under exemption 6 of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (6). This exemption operates to privilege from disclosure personnel and medical files and similar files not only of Agency personnel but also the files of other persons which might be in the possession of the Agency in the course of processing a case. Moreover, exemption 6 requires the Board to balance the right of privacy of affected individuals against the right of the public to be informed. Cf. Getman v. N.L.R.B., 450 F. 2d 670 (C.A.D.C.). Since you have submitted no showing of public interest which would, I find, overcome the privacy right of individuals, their right of privacy must prevail.

7A-1 The appeals memorandum is also privileged from disclosure under Exemption 7 (A) of the Freedom of Information Act, 5 U.S.C. Section 552 (b)(7)(A), since it is an investigory record compiled for law enforcement purposes and its disclosure would interfere with enforcement proceedings. Making memoranda available upon request would have the effect of restricting communication within the Agency, and prematurely disclosing attorney work product and analysis. Since proper enforcement of the labor laws administered by this Agency depends to a great extent upon free and frank communication within the Agency, preserving the integrity of this intra-agency communication is a necessary aspect of the Board's enforcement responsibility. See, Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834.

7A-2 The instructions are also privileged from disclosure under Exemption 7 (A) of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (7) (A), since they are investigatory records compiled for law enforcement purposes and their disclosure would interfere with enforcement proceedings. Making memoranda available upon request would have the effect of restricting communication within the Agency, and prematurely disclosing attorney work product and analysis. Since proper enforcement of the labor laws administered by this Agency depends to a great extent upon free and frank communication within the Agency, preserving the integrity of this intra-agency communication is a necessary aspect of the Board's enforcement responsibility. See, Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834.

7A-3 The statements you request are privileged from disclosure by exemptions 7(A), (C), and (D) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7)(A)), (7)(C)) and (7(D)). Exemption 7(A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the investigation of unfair labor practice cases much information, including statements, is obtained from individuals who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the identity of individuals and the substance of the information they submit in the Agency's investigation is an important means of assuring the Agency's continuing ability to obtain such relevant information. Individuals giving statements in the investigation are given express assurances that sworn statements will not be disclosed unless and until the individual is called as a witness in a formal proceeding, as provided for in Section 102.118(b) of the Board's Rules and Regulations. If the Agency were forced to disclose statements submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118(b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation of witnesses, hinder obtaining sworn information from all potential sources and, consequently, substantially interfere with present and future enforcement proceedings. See, Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.C.P.R.); Clement Brothers Co. v. N.L.R.B., 282 F. Supp. 540 (D.C. Ga.) affmd., N.L.R.B. v. Clement Brothers Co., 407 F. 2d 1027 (C.A. 5); Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834; cf. N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26 (C.A. 5).

7A-4 The legal memorandum is also privileged from disclosure under exemption 7(A) of the Freedom of Information Act, 5 U.S.C. Section 552(b) (7) (A), since it is an investigatory record compiled for law enforcement purposes and its disclosure would interfere with enforcement proceedings. Making memoranda available upon request would have the effect of restricting communication within the Agency, and prematurely disclosing attorney work product and analysis. Since proper enforcement of the labor laws administered by this Agency depends to a great extent upon free and frank communication within the Agency, preserving the integrity of this intra-agency communication is a necessary aspect of the Board's enforcement responsibility. See Wellman Industries, Inc. v. N.L.R.B. 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834.

7A-5 The advice submission memorandum is also privileged from disclosure under exemption 7(A) of the Freedom of Information Act, 5 U.S.C. Section 552(b) (7) (A), since it is an investigatory record compiled for law enforcement purposes and its disclosure would interfere with enforcement proceedings. Making memoranda available upon request would have the effect of restricting communication within the Agency, and prematurely disclosing attorney work product and analysis. Since proper enforcement of the labor laws administered by this Agency depends to a great extent upon free and frank communication within the Agency, preserving the integrity of this intra-agency communication is a necessary aspect of the Board's enforcement responsibility. See, Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834.

7A-6 The investigatory records you request are privileged from disclosure by exemptions 7(A), (C), and (D) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (7(A)), (7 (C)) and (7(D)). Exemption 7 (A) exempts from disclosure investigatory records where disclosure would interfere with enforcement pro-

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ceedings. In the processing of cases much information is obtained from individuals who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the identities of individuals and the substance of the information they submit in the Agency's investigation is an important means of assuring the Agency's continuing ability to obtain such relevant information. If the Agency were forced to disclose information submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118(b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation, hinder obtaining information from all potential sources and, consequently, substantially interfere with present and future enforcement proceedings. See, Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.C.P.R.); Clement Brothers Co. v. N.L.R.B., 282 F. Supp. 540 (D.C. Ga.) affmd., N.L.R.B. v. Clement Brothers Co., 407 F. 2d 1027 (C.A. 5); Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834; cf. N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26 (C.A.5).

7A-7 The recommendation is also privileged from disclosure under exemption 7 (A) of the Freedom of Information Act, 5 U.S.C. Section 552(b) (7) (A), since it is an investigatory record compiled for law enforcement purposes and its disclosure would interfere with enforcement proceedings. Making such memoranda available upon request would have the effect of restricting communication within the Agency, and prematurely disclosing attorney work product and analysis. Since proper enforcement of the labor laws administered by this Agency depends to a great extent upon free and frank communication within the Agency, preserving the integrity of this intra-agency communication is a necessary aspect of the Board's enforcement responsibility. See, Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834.

7A-8 The investigatory records you request are privileged from disclosure by exemptions 7(A) and (C) of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (7(A)) and (7(C)). Exemption 7(A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the processing of cases much information is obtained from parties who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the substance of the information submitted in the Agency's investigation is an important means of assuring the Agency's continuing ability to obtain such relevant information. If the Agency were forced to disclose information submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118 (b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation, hinder obtaining information from all potential sources and, consequently, substantially interfere with present and future enforcement proceedings. See, Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.C.P.R.); Clement Brothers Co. v. N.L.R.B., 282 F. Supp. 540 (D.C. Ga.) affmd., N.L.R.B. v. Clement Brothers Co., 407 F.2d 1027 (C.A. 5); Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834; cf. N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26 (C.A. 5)

7A-9 The investigatory records you request are privileged from disclosure by exemptions 7 (A) and (C) of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (7 (A)) and (7 (C)). Exemption 7 (A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the processing of cases much information is obtained from individuals who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the identities of individuals and the substance of the information they submit in the Agency's investigation is an important means of assuring the Agency's continuing ability to obtain such relevant information. If the Agency were forced to disclose information submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118 (b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation, hinder obtaining information from all potential sources and, consequently, substantially interfere with present and future enforcement proceedings. See, Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.C.P.R.); Clement Brothers Co. v. N.L.R.B., 282 F. Supp. 540 (D.C. Ga.) affmd., N.L.R.B. v. Clement Brothers Co., 407 F. 2d 1027 (C.A. 5); Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834; cf. N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26 (C.A. 5).

7A-10 The investigatory records you request are privileged from disclosure by exemptions 7 (A) and (C) of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (7 (A)) and (7 (C)). Exemption 7 (A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the processing of cases much information is obtained from parties who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the substance of the information submitted in the Agency's investigation is an important means of assuring the Agency's continuing ability to obtain such relevant information. If the Agency were forced to disclose information submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118 (b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation, hinder obtaining information from all potential sources and, consequently, substantially interfere with present and future enforcement proceedings. See, Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.C.P.R.); Clement Brothers Co. v. N.L.R.B., 282 F. Supp. 540 (D.C. Ga.) affmd., N.L.R.B. v. Clement Brothers Co., 407 F. 2d 1027 (C.A. 5); Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834; cf. N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26 (C.A. 5).

7C-1 Certain of these memoranda are also exempt from disclosure under exemptions 7 (C) and 7 (D) of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (7 (D)), because they contain the names and a substantially verbatim recitation of witnesses' testimony and, therefore, disclosure would constitute an unwarranted invasion of privacy or reveal a confidential source.

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7C-2 Certain of these instructions are also exempt from disclosure under exemptions 7 (C) and 7 (D) of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552 (b) (7 (C)) and (7 (D)), because they contain the names and a substantially verbatim recitation of witnesses' testimony and, therefore, disclosure would constitute an unwarranted invasion of privacy or reveal a confidential source.

7C-3 Also, since these statements contain matter personal to the individual supplying the statement and to individuals referred to in the statements, they are exempt from disclosure under exemption 7(C). This exemption protects the personal privacy of individuals submitting statements and individuals named therein, and requires the balancing of their interests in privacy against the interest of a requesting party in disclosure. You have submitted no considerations which would, I find, overcome the privacy rights of individuals and, therefore, their right of privacy must prevail.

7C-4 Certain of these memoranda are also exempt from disclosure under exemptions 7(C) and 7(D) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(C)) and (7(D)), because they contain the names and a substantially verbatim recitation of witnesses' testimony and, therefore, disclosure would constitute an unwarranted invasion of privacy or reveal a confidential source.

7C-5 Certain of these memoranda are also exempt from disclosure under exemptions 7(C) and 7(D) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(C)) and (7(D)), because they contain the names and a substantially verbatim recitation of witnesses' testimony and, therefore, disclosure would constitute an unwarranted invasion of privacy or reveal a confidential source.

7C-6 Also, since these statements contain matter personal to the individual supplying the statement and to individuals referred to in the statements, they are exempt from discloure under exemption 7(C). This exemption protects the personal privacy of individuals submitting statements and individuals named therein, and requires the balancing of their interests in privacy against the interest of a requesting party in disclosure. You have submitted no considerations which would, I find, overcome the privacy rights of individuals and, therefore, their right of privacy must prevail.

7C-7 Also, since these investigatory records contain matter personal to the individuals supplying them, and to individuals referred to therein, they are exempt from disclosure under exemption 7(C) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7)(C), for the considerations set forth under exemption 6 above.

7C-8 Also, since these investigatory records contain matter personal to the individuals supplying them, and to individuals referred to therein, they are exempt from disclosure under exemption 7(C) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7)(C), for the considerations set forth under exemption 6 above.

7C-9 Also, since these investigatory records contain matter personal to the individuals supplying them, and to individuals referred to therein, they are exempt from disclosure under exemption 7(C) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552 (b)(7)(C), for the considerations set forth under exemption 6 above.

7D-1 Certain of these memoranda are also exempt from disclosure under exemptions 7(C) and 7(D) of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(C)) and (7(D)), because they contain the names and a substantially verbatim recitation of witnesses' testimony and, therefore, disclosure would constitute an unwarranted invasion of privacy or reveal a confidential source.

7D-2 Certain of these instructions are also exempt from disclosure under exemptions 7(C) and 7(D) of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(C)) and (7(D)), because they contain the names and a substantially verbatim recitation of witnesses' testimony and, therefore, disclosure would constitute an unwarranted invasion of privacy or reveal a confidential source.

7D-3 The requested statements are also within exemption 7(D) because their disclosure would reveal the identity of a confidential source, i.e., an individual who provides information under an express assurance of confidentiality or in circumstances from which such assurances can reasonably be inferred. As noted above, individuals giving statements to the Agency during the investigation are advised and assured that their statements will remain confidential, except as provided by Section 102.118 of the Board's Rule and Regulations. This policy of protecting confidential sources of information has been consistently followed in the administration of the Act and is well known to those persons dealing with this Agency. Accordingly, since the individuals furnishing statements in the instant case are confidential sources, exemption 7(D) authorizes our refusal to identify the witnesses.

7D-4 Certain of these memoranda are also exempt from disclosure under exemptions 7(C) and 7(D) of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(C)) and (7(D)), because they contain the names and a substantially verbatim recitation of witnesses' testimony and, therefore, disclosure would constitute an unwarranted invasion of privacy or reveal a confidential source.

7D-5 Certain of these memoranda are also exempt from disclosure under exemptions 7(C) and 7(D) of Section 552 (b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(C)) and (7(D)), because they contain the names and a substantially verbatim recitation of witnesses' testimony and, therefore, disclosure would constitute an unwarranted invasion of privacy or reveal a confidential source.

7D-6 The requested statements are also within exemption 7(D) because their disclosure would reveal the identity of a confidential source, i.e., an individual who provides information under an express assurance of confidentiality or in circumstances from which such assurances can reasonably be inferred. As noted above, individuals giving statements to the Agency during the investigation are advised and assured that their statements will remain confidential, except as provided by Section 102.118 of the Board's Rules and Regulations. This policy of protecting confidential sources of information has been consistently followed in the administration of the Act and is well known to those persons dealing with this Agency. Accordingly, since the individuals furnishing statements in the instant case are confidential sources, exemption 7(D) authorizes our refusal to identify the witnesses.

-- End of Supplement --

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Exhibit 2

NATIONAL LABOR RELATIONS BOARD
REGION 2
Federal Building, Room 3614, 26 Federal Plaza
New York, New York 10007
Telephone 264-0300

July 3, 1975

Jackson, Lewis, Schnitzler & Krupman
Att: Robert Lewis, Esq.
261 Madison Avenue
New York, New York 10016

Re: The Title Guarantee Company
Case No. 2-CA-13745

Dear Mr. Lewis:

This is in response to your letter dated July 2, 1975, received by this office on that date, in which you requested copies of all written statements contained in the Board's case files in connection with the above-captioned matter, be made available to you for inspection and copying. Your request must be denied. As more fully detailed below, the statements which you have requested are privileged from disclosure under one or more of the exemptions contained in Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(5) and (7(A), (C) or (D)).

The "complete copies of all affidavits and/or signed statements, which were obtained during the course of the Regional Director's investigation [for] those witnesses who the General Counsel anticipates calling to testify during the hearing in the above-captioned matter. . .", which you have requested, are investigatory records privileged from disclosure by exemption (7(A), (C), and (D)) of Section 552(b) of the Freedom of Information Act. Exemption (7(A) exempts from disclosure investigatory records where disclosure thereof would interfere with enforcement proceedings. In the Board's processing of cases, much information is obtained from individuals who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the National Labor Relations Act, the Board must be able to obtain in its investigations all potentially relevant information. The protection of the identities of individuals and the substance of the information which they submit during the Board's investigation is an important means for assuring the agency's continuing ability to obtain such relevant information. If the Board were forced to disclose information submitted or obtained during the investigation of a case, other than in those circumstances provided in Section 102.118(b) of its Rules and Regulations, it would substantially deter voluntary cooperation, hinder obtaining information from all potential sources, and consequently, substantially interfere with present and future enforcement proceedings. Cf. N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26.

Moreover, disclosure of the material which you have requested is inimicable to the adversarial process and would do violence to the historic privilege against disclosure of an attorney's work product. See, N.L.R.B. v. Sears Roebuck and Co., (April 28, 1975) 89 LRRM 2001; Hickman v. Taylor, 329 U.S. 495 (1946); Frankel v. Securities and Exchange Commission, 460 F. 2d 813, 817.

Also, since these statements contain matter personal to the individuals supplying the statements and to the individuals referred to in those statements, they are exempt from disclosure under exemption (7)(C). This exemption protects the personal privacy of individuals submitting statements and individuals named therein, and requires the balancing of their interests in privacy against the interest of a requesting party, such as yourself. Since you have submitted no considerations which would, I find, overcome the privacy rights of these individuals, their right of privacy must prevail.

The requested statements are also within exemption (7)(D) because their disclosure would reveal the identities of a confidential source, i.e., an individual who provides information under an express assurance of confidentiality, or in circumstances from which such assurances can reasonably be inferred. As noted above, individuals giving statements to the Board during the course of an investigation are advised and assured that their statements will remain confidential, except as provided by Section 102.118 of the Board's Rules and Regulations. This policy of protecting confidential sources of information has been consistently followed in the administration of the National Labor Relations Act and is well known to those persons dealing with this agency. Accordingly, since the individuals furnishing statements in the instant case are confidential sources, exemption (7)(D) authorizes our refusal to supply the requested statements which would identify these individuals.

Further, the deletion of names from these statements would not preserve the interests recognized by exemptions (7)(A), (C), and (D) since disclosure of the material contained therein would, itself, constitute invasion of personal privacy, reveal confidential sources, and, consequently interfere with enforcement proceedings under the considerations set forth above. Moreover, the considerations for non-disclosure set forth herein are particularly compelling with respect to statements by, or concerning employees of, the respondent-employer in this proceeding. Deletion of portions sufficient to prevent an unwarranted invasion of personal privacy or prevent disclosure of confidential sources would result in a record so fragmented as to be incoherent and not responsive to your request.

The undersigned is responsible for the determination that the statements you have requested are privileged from disclosure under the Freedom of Information Act.

You may obtain a review of that determination under the provisions of Section 102.117(c)(2)(ii) of the Board's Rules and Regulations by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D. C. 20570, within 20 days (excluding Saturdays, Sundays, and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Very truly yours,

Sidney Danielson
Regional Director

Exhibit 3

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

August 1, 1975

Re: The Title Guarantee Co.
Case No. 2-CA-13745

Robert Lewis, Esquire
Jackson, Lewis, Schnitzler
and Krupman
261 Madison Avenue
New York, New York 10016

Dear Mr. Lewis:

Your appeal from the Regional Director's refusal to furnish information requested in your letter of July 2, 1975, has been considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of July 3, 1975. Concerning your contention that this Agency must disclose affidavits from which confidential material can be deleted, it should be noted that Congress had a two-fold purpose in enacting exemption 7 of the Freedom of Information Act (hereinafter, the "FOIA"), 5 U.S.C. Section 552(b)(7). See Frankel v. S.E.C., 460 F.2d 813, 817 (C.A. 2, 1972). The purposes enumerated by the Court were to keep confidential the procedures by which the Agency conducts its investigations and by which it has obtained information as well as to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court. Both of these forms of confidentiality were deemed necessary by the Court for effective law enforcement. In this regard, see also N.L.R.B. v. Sears, Roebuck and Company, 95 S. Ct. 1504, n.28 and Wellman Industries Inc., v. N.L.R.B., 490 F.2d 427 (C.A. 4, 1974). Moreover, both Frankel, supra, and Wellman, supra, make it clear that the FOIA was not intended to give parties indirectly any earlier or greater access to investigatory files than they would have directly in litigation with the Agency and it is clear that this Agency, with the approval of the Court of Appeals for the Second Circuit, would not permit such pre-trial discovery. N.L.R.B. v. Interboro Contractors, Inc., 432 F.2d 855, 857-860 (C.A., 1970), cert. denied, 402 U.S. 915.

The undersigned, Robert E. Allen, at the direction of and pursuant to the policies established by, General Counsel Peter G. Nash, is responsible for the determination that the records you requested are priviledged from disclosure under the Freedom of Information Act.

Judicial review of this determination may be obtained by filing a complaint in the district court of the United States in the district in which the complainant resides, or has his place of business, or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B).

Very truly yours,

Peter G. Nash
General Counsel

By _____
Robert E. Allen
Director, Office of Appeals

cc: Director, Region 2

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. CIV. M-18-304

NATIONAL LABOR RELATIONS BOARD,
APPLICANT,

~~Plaintiff~~

against

BIOPHYSICS SYSTEMS, INC.

RESPONDENT

~~Defendant~~

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
11 WISTERIA COURT, ORANGEBURG, NEW YORK 10962

That on January 23 *19* 76 *deponent served the annexed*

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS COUNTERCLAIMS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

on attorney(s) for Abigail Couley, Assistant General Counsel for Special Litigation, NLRB, 1717 Pennsylvania Ave., N.W., Washington, D.C. 20570 *in this action at*

the address designated by said attorney(s) for that purpose by depositing a tru copy of same enclosed in a postpaid properly addressed wrapper, in—a ~~post office~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me
January 23, 1976

Angelo M. Capariolo
Angelo M. Capariolo *name signed beneath*

SANDY LEVITT
NOTARY PUBLIC, State of New York
No. 60-4616562 Qual. in Westchester Co.
Cert. filed in New York County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NATIONAL LABOR RELATIONS BOARD,

Applicant,

-against-

BIOPHYSICS SYSTEMS, INC., M18-304

Respondent,

and

BIOPHYSICS SYSTEMS, INC.,

Respondent,

-against-

JOHN S. IRVING, General Counsel of the National Labor Relations Board, and SIDNEY DANIELSON, Regional Director of the National Labor Relations Board, Region 2,

Additional Defendants on the Counterclaims.

----------x

Respondent Biophysics Systems, Inc. ("Biophysics") and the National Labor Relations Board ("NLRB," or "the Board") are currently involved in unfair labor practice proceedings which are scheduled for an administrative hearing on May 10, 1976. This Court must determine Biophysics' rights under the Freedom of Information Act, 5 U.S.C. §552 ("FOIA") to obtain disclosure of certain material from the NLRB.

On January 7, 1976 the Board filed with this Court an application for an order requiring compliance with a subpoena duces tecum served upon Biophysics. Respondent answered and counterclaimed, asserting that certain material requested in a letter to the NLRB dated June 16, 1975 must be disclosed. The NLRB then moved for an order pursuant to Rule 12(b)(6), Fed. R. Civ. P., dismissing the counterclaims for failure to state a claim upon which relief can be granted, or, in the alternative, for an order granting summary judgment pursuant to Rule 56(c), Fed. R. Civ. P.

The parties have resolved the application for an order requiring compliance with the subpoena duces tecum, leaving only the motion addressed to the counterclaims. For the reasons hereinafter stated, summary judgment is granted in favor of the NLRB.

In the aforementioned letter dated June 16, 1975, Biophysics requested the following material from the NLRB:

> ...complete copies of all affidavits and/or signed statements, which were obtained during the course of the Regional Director's investigation, of those witnesses who the General Counsel anticipates calling to testify during the hearing. . . . In the alternative copies of the affidavits and/or statements of the above witnesses with all personal identification removed. . . . copies of all authorization cards signed by Respondent's employees selecting Local 1783 as their collective bargaining representative. . . . copies of all notes, memoranda, correspondence,

> papers, reports, inter-office communications, minutes of meetings, and all other records and documentary material in the custody or control of the Regional Director and General Counsel, which were obtained during the course of the investigation of this matter, and which are inconsistent with or conflict with the charges alleged in the complaint, or which show or may tend to show that Respondent may not have committed the unfair labor practices alleged therein.

This request was denied on the grounds that the information sought was privileged from disclosure by Exemptions 5 and 7(A), (C), and (D) of the FOIA.

While this motion was sub judice, the Court of Appeals for the Second Circuit decided Title Guarantee Co. v. National Labor Relations Board, Docket No. 75-6119 (2d Cir. April 2, 1976). Although the holding of that case involved only statements of employees and union representatives and not the additional material requested here, and the Court of Appeals dealt solely with Exemption 7(A) of the FOIA,[1] this Court believes Title Guarantee to be dispositive of the instant controversy.

As stated by the Court of Appeals:

> Since 1935 the Board rule pertaining to an enforcement proceeding, now contained in 29 C.F.R. §102.30 (1975), has not provided for the taking of depositions for the purposes of discovery as in the case of the Federal Rules of Civil Procedure.

Instead, it has permitted limited discovery only for the purpose of obtaining and preserving evidence for trial. NLRB v. Interboro Contractors, Inc., supra, 432 F.2d at 858. The policy has been said to be a "logical one," id., followed by other administrative agencies and in no way affected by the Administrative Procedure Act. Id. at 858-59. Under the Board rules, however, affidavits become available to a litigant "after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint . . . ." 29 C.F.R. §102.118(b)(1) (1975). The rules provide that the administrative law judge shall "order the production of any statement . . . of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified [for] examination and use for the purpose of cross-examination." Id. In other words, the only discovery available to the party charged with an unfair labor practice under the National Labor Relations Act, absent the requirements of the Freedom of Information Act, is equivalent to that available to a criminal defendant under the Jencks Act, 18 U.S.C. §3500. Neither the liberal provisions of the Federal Rules of Civil Procedure pertaining to pretrial discovery nor the liberalized rules of the Federal Rules of Criminal Procedure have any bearing on Board discovery procedures. The Board rules prohibit anyone, including any employee of the Board, regional director or administrative law judge, from producing any "files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise" except as might be required under the Freedom of Information Act or upon the written consent of the Board or the chairman of the Board. 29 C.F.R. §102.118(a) (1975). Accordingly, if pre-hearing discovery is to be obtained as a matter of right by a party charged under 29 U.S.C. §160 with an unfair labor practice, the source for the right must be found within the Freedom of Information Act.
Slip op. at 2964-65.

The Court went on:

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings.
> Slip op. at 2973.

This Court reads the broad language of Title Guarantee to foreclose discovery of the material sought by Biophysics. Clearly, the statements of witnesses need not be disclosed at this stage. Moreover, the reasoning of the Second Circuit indicates that the additional material requested is also exempt. Slip op. at 2970-74.

The Court of Appeals noted with approval the NLRB's expressed fear that disclosure of investigative material would permit, "suspected violators . . . to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied. . . ." Slip op. at 2971. It later cites the Attorney General's Memorandum on the 1974 Amendments for the principle that, "[o]ne example of interference when litigation is pending or in prospect is harm to the Government's case through the premature release of information not possessed by known or potential adverse parties." Slip op. at 2974.

Biophysics' request for "Brady material" surely falls within these strictures and is consequently denied.

Respondent's demand for copies of all authorization cards signed by its employees designating Local 1783 as their representative must also be denied. Disclosure of the cards would present the same dangers posed by the NLRB and recognized by the Court of Appeals. Slip op. at 2971-72. It could reveal something of the Board's case prematurely. And, it would definitely tend to "chill" employees in the exercise of their protected rights to seek a representation election and later to press unfair labor charges related to that election.

As observed by the Second Circuit, there exists a, "delicate relationship . . . between employer and employee." Slip op. at 2973. The NLRB's recognition of this explains its reluctance to release information which might tend to strain that relationship and unduly hamper the Board's efforts to enforce federal labor legislation. Obviously the cooperation of employees involved in this unfair labor practice proceeding might well diminish if they learned the NLRB had turned over their authorization cards.

In addition, although the Court of Appeals did not reach the applicability of Exemption 7(C) in Title Guarantee, that exemption bears upon the authorization cards here since it precludes disclosure which would, "constitute an unwarranted

invasion of personal privacy." The interest in confidentiality which attaches to a union authorization card approaches that which surrounds the secret ballot in an election. See generally Ditlow v. Shultz, 517 F.2d 166 (D.C. Cir. 1975).

In sum, this Court, guided by the Court of Appeals' recent pronouncements in Title Guarantee, concludes that the FOIA does not entitle Biophysics to disclosure of the material requested in its letter of June 16, 1975. Accordingly, the NLRB's motion for summary judgment is granted and the counterclaims are dismissed.

It is so ordered.

Dated: April 12, 1976

Robert L. Ward
U.S.D.J.

NOTE

1 Exemption 7(A), 5 U.S.C. §552(b)7(A), bars disclosure of, "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings. . . ."

WILLIAM WACHTER, Acting Assistant
General Counsel for Special Litigation
1717PPennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221

- and -

EDWIN H. BENNETT, Regional Attorney
Region 2, N.L.R.B.
36th Floor - Federal Bldg.
26 Federal Plaza
New York, New York 10007
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ATTORNEYS FOR NATIONAL LABOR
RELATIONS BOARD

Filed 11/21/76
Received
Entered in Docket
Entered in Diary For

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD, Applicant, v. BIOPHYSICS SYSTEMS, INC., Respondent, and BIOPHYSICS SYSTEMS, INC., Respondent, v. JOHN S. IRVING, General Counsel of the National Labor Relations Board, and SIDNEY DANIELSON, Regional Director of the National Labor Relations Board, Region 2, Additional Defendants on the Counterclaims.	Civil Action No. M18-304 ~~76-6094~~

STIPULATION

The parties hereby stipulate that during the hearing before the Court in the above-captioned matter, counsel for the National Labor Relations Board submitted to the Court and to counsel for

Biophysics Systems, Inc.:

1. An index of documents contained in the Board's investigatory file (Exhibit A, attached infra.),

2. A supplemental list of items contained in the Board's investigatory file (Exhibit B, attached, infra.), and

3. A supplement to the index namely a summary of union authorization cards also held by the Board and relevant to its unfair labor practice investigation (Exhibit C, attached, infra.).

The parties further stipulate that these indexes were before the Court when this case was under consideration, and that they are material to the instant case.

The parties hereby stipulate that these indexes, Exhibits A, B and C, should therefore be forwarded to the United States Court of Appeals for the Second Circuit as part of the record on appeal of the instant case.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Attorneys for Applicant and
Additional Defendants on Counterclaims

Dated: Washington, D.C.
July 14, 1976

By William Wachter
WILLIAM WACHTER, Acting Assistant
General Counsel for Special
Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221

Respondent Biophysics Systems, Inc.

By its attorneys Proskauer, Rose,
Goetz & Mendelsohn

Dated: New York, N.Y.
July 19, 1976

By Lois D. Thompson
LOIS D. THOMPSON, Esq.

ITEMS CONTAINED IN
INVESTIGATORY FILE IN
BOARD CASE NO. 2-CA-13562
AS OF DECEMBER 10, 1975

	DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A) 1/
1.	Table of Contents of Case file	N.R.
2.	Letter from Company's (Respondent in underlying unfair labor practice proceeding) dated October 15, 1975, transmitting to NLRB papers defendant planned to submit to Court in response to NLRB's application for subpoena enforcement.	N.W. 2/
3.	Draft of Answer and Counterclaims Company submitted to Court in response to NLRB's application for subpoena enforcement.	N.W.
4.	Letter to Company's counsel from NLRB dated October 6, 1975, transmitting copy of Application for subpoena enforcement, exhibits thereto and Order to Show Cause NLRB intended to submit to the court.	N.W.
5.	Draft of Order to Show Cause which NLRB intended to submit to Court.	N.W.
6.	Draft of Application for Order Requiring Obedience to Subpoena Duces Tecum which NLRB intended to submit to Court.	N.W.
7.	Index to Exhibits NLRB intended to submit to Court with Application for subpoena enforcement.	N.W.

1/ Exemption 7(A) is claimed for all the investigatory records compiled in Board Case No. 2-CA-13562. Thus it is claimed for every item on this list which is within defendant's FOIA request and not already in defendant's possession.

2/ Not withheld. Exemption status need not be determined for this and other items which defendant already possesses, since they are not being withheld from defendant and not at issue in the case.

EXHIBIT A

DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
8. Unfair labor practice charge filed December 18, 1974 against Company by Local 1783, International Brotherhood of Electrical Workers (hereafter Local 1783, IBEW).	N.W.
9. Complaint and Notice of Hearing in Case No. 2-CA-13562, dated March 25, 1975.	N.W.
10. Company's Answer to Item 9 above, dated April 4, 1975.	N.W.
11. Letter to Company from Local 1783, IBEW dated October 29, 1974 announcing its status as majority representative of defendant's employees.	N.W.
12. Letter to Local 1783, IBEW from Company dated October 31, 1974, declining to recognize the union.	N.W.
13. Company's Amended Answer to Item 9 above dated June 19, 1975.	N.W.
14. Same as Item 11 above.	N.W.
15. Same as Item 12 above.	N.W.
16. Order dated April 15, 1975 Rescheduling Hearing from May 5 to May 27, 1975.	N.W.
17. Order dated May 20, 1975 Rescheduling Hearing from May 27 to July 14, 1975.	N.W.
18. Order dated July 10, 1975 Rescheduling Hearing from July 14 to September 9, 1975.	N.W.
19. Order dated September 8, 1975 Rescheduling Hearing from September 8, 1975 to November 10, 1975.	N.W.
20. Subpoena Duces Tecum dated July 7, 1975, issued by NLRB to Company directing Company's appearance at July 14, 1975 hearing or any rescheduled date thereof and requiring the production of certain documents listed in its Attachment A.	N.W.

DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
21. Attachment A to Item 20 above.	N.W.
22. Eligibility list of Company's employees in Case No. 2-RC-16670.	N.W.
23. Return receipt dated July 9, 1975 of article addressed to Company.	N.W.
24. Index to Company's petition to revoke subpoena duces tecum and documents in support thereof.	N.W.
25. Letter dated July 10, 1975 to Region 2, N.L.R.B. from Company's counsel refusing to comply with Board's subpoena duces tecum and requesting the Board to revoke the subpoena. (petition to revoke subpoena)	N.W.
26. Letter dated July 7, 1975 to Company's counsel from N.L.R.B. Attorney transmitting copies of subpoenas served that day on defendant.	N.W.
27. Subpoena dated July 7, 1975 issued by N.L.R.B. to Mr. Firedman directing his appearance at July 14, 1975 hearing, or any rescheduled date thereof.	N.W.
28. Subpoena dated July 7, 1975 issued by N.L.R.B. to Mr. Silverstro directing his appearance at July 14, 1975 hearing, or any rescheduled date thereof.	N.W.
29. Same as Item 20 above.	N.W.
30. Same as Item 21 above.	N.W.
31. Same as Item 22 above.	N.W.
32. Letter to Region 2, N.L.R.B. from Company's counsel dated June 16, 1975 requesting copies of documents pursuant to 5 U.S.C. §552; 29 U.S.C. §160(b) and §102.117 of Rules and Regs. of N.L.R.B.	N.W.
33. Letter to Company's counsel from Region 2 dated June 20, 1975 refusing Company's counsel's request (Item 32 above).	N.W.

DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
34. Letter to N.L.R.B. General Counsel from Company's counsel dated July 2, 1975, appealing Region 2's refusal to Company's June 16 request (Item 32 above).	N.W.
35. Demand to General Counsel for list of Anticipated Witnesses by Company's counsel dated June 31, 1975.	N.W.
36. General Counsel's Opposition to Company's Demand for list of Anticipated Witnesses dated July 2, 1975.	N.W.
37. Order Referring Motion (Demand for list of anticipated witnesses, Item 35 above) to Chief Administrative Law Judges for ruling, dated July 3, 1975.	N.W.
38. Demand to General Counsel for A Bill of Particulars by Company's counsel, dated June 13, 1975.	N.W.
39. General Counsel's Response In Part and Opposition In Part to Company's Demand for Bill of Particulars, dated July 2, 1975.	N.W.
40. Exhibit 1 to Item 39 above -- sample of type of authorization card signed by Company's employees.	N.W.
41. Order Referring Motion (Demand for bill of particulars Item 38 above) to Chief Administrative Law Judge for ruling, dated July 3, 1975.	N.W.
42. General Counsel's Statement dated July 15, 1975 in Opposition to Company's petition to revoke subpoena duces tecum (Item 25 above).	N.W.
43. Order dated July 16, 1975 referring petition to revoke subpoena to Chief Administrative Law Judge for ruling.	N.W.
44. Order of Administrative Law Judge (hereafter "ALJ") Leff dated July 18, 1975, denying Company's petition to revoke subpoena duces tecum (Item 25 above).	N.W.

DESCRIPTION OF ITEM		EXEMTPIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
45.	Order of ALJ Leff dated July 18, 1975, denying Company's demand for list of anticipated witnesses (Item 35 above).	N.W.
46.	Order of ALJ Leff dated July 18, 1975, denying Company's demand (Item 38 above) for bill of particulars.	N.W.
47.	Letter to Company's counsel from General Counsel dated July 29, 1975, denying Company's appeal (Item 34 above) of Board's refusal to supply Company with information.	N.W.
48.	Letter to Region 2, N.L.R.B. from Company counsel dated August 13, 1975, refusing to comply with Board's subpoena duces tecum.	N.W.
49.	Letter dated July 9, 1975 from N.L.R.B. attorney to subpoenaed witnesses giving notice of rescheduling of hearing. No name or address caption appeas on letter.	N.R. 3/
50.	List of witnesses to whom N.L.R.B. attorney sent Item 49 above.	N.R.
51.	Affidavit of Service dated July 16, 1975 of Order referring petition to revoke subpoena to Chief Administrative Law Judge.	N.R.
52.	Same as Item 43 above.	N.W.
53.	Same as Item 42 above.	N.W.
54.	Same as Item 25 above.	N.W.
55.	Same as Item 26 above.	N.W.
56.	Same as Item 27 above.	N.W.
57.	Same as Item 28 above.	N.W.

3/ Not requested. Information in this document is not information coming within any categories of Company's request. Since not at issue, exemption status need not be determined.

DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
58. Same as Item 20 above.	N.W.
59. Same as Item 21 above.	N.W.
60. Same as Item 22 above.	N.W.
61. Same as Item 32 above.	N.W.
62. Same as Item 33 above.	N.W.
63. Same as Item 34 above.	N.W.
64. Same as Item 35 above.	N.W.
65. Same as Item 36 above.	N.W.
66. Same as Item 37 above.	N.W.
67. Same as Item 38 above.	N.W.
68. Same as Item 39 above.	N.W.
69. Same as Item 40 above.	N.W.
70. Application dated July 7, 1975, to Regional Director of Region 2, N.L.R.B. attorney for issuance of subpoenas.	N.R.
71. Appendix to Item 70 above, describing documents to be included in subpoena duces tecum.	N.R.
72. Same as Item 22 above.	N.W.
73. Rough draft of Item 20 above.	N.R.
74. Rough draft of Item 21 above.	N.R.
75. Attachment to Item 76 below: List of persons for whom N.L.R.B. attorney seeks subpoenas.	N.R.
76. Application dated July 1, 1975 to Regional Director of Region 2, N.L.R.B. from NLRB attorney for issuance of subpoenas for persons listed in Attachment (Item 75 above).	N.R.
77. Draft of subpoena to be sent to prospective witnesses, attached to Item 76 above.	N.R.

DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
78. Same as Item 75 above.	N.R.
79. Same as Item 47 above.	N.W.
80. Same as Item 34 above.	N.W.
81. Same as Item 33 above.	N.W.
82. Same as Item 32 above.	N.W.
83. Same as Item 33 above.	N.W.
84. Same as Item 32 above.	N.W.
85. Same as Item 32 above.	N.W.
86. Same as Item 45 above.	N.W.
87. Same as Item 46 above.	N.W.
88. Same as Item 37 above.	N.W.
89. Same as Item 36 above.	N.W.
90. Same as Item 35 above.	N.W.
91. Same as Item 41 above.	N.W.
92. Same as Item 39 above.	N.W.
93. Same as Item 40 above.	N.W.
94. Same as Item 38 above.	N.W.
95. Demand by Company's counsel to Charging Party dated June 13, 1975 for List of Anticipated Witnesses.	N.R.
96. Demand dated June 13, 1975 by Company's counsel to Charging Party for a Bill of Particulars.	N.R.
97. Same as Item 35 above.	N.W.
98. Same as Item 38 above.	N.W.
99. Same as Item 13 above.	N.W.
100. Exhibit 1 to Amended Answer: Same as Item 11 above.	N.W.

DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
101. Exhibit 2 to Amended Answer: Same as Item 12 above.	N.W.
102. Same as Item 10 above.	N.W.
103. Exhibit 1 of Company's Answer: Same as Item 11 above.	N.W.
104. Exhibit 2 of Company's Answer: Same as Item 12 above.	N.W.
105. Memorandum to General Counsel from Region 2 reporting issuance of Complaint in Case No. 2-CA-13562 and explaining reasons therefor: Summarizes facts gained during investigation, discloses names and personal information of informants who were promised confidentiality by N.L.R.B. attorney, 4/ and applies legal analysis of NLRB attorneys to facts of case.	5, 7(C), (D)
106. Same as Item 9 above.	N.W.
107. Letter to Local 1783, IBEW from Regional Director, Region 2, N.L.R.B. dated April 13, 1975 approving withdrawal of portion of unfair labor practice charges.	N.R.
108. Withdrawal request submitted by Local 1783, IBEW, April 2, 1975 requesting partial withdrawal of charges.	N.R.
109. Memorandum to Regional Director, Region 2, NLRB dated April 2, 1975 from NLRB agents summarizing their recommendations regarding withdrawal request Item 108 above.	5
110. Transmittal letter to NLRB attorney from Local 1783, IBEW counsel dated December 19, 1974, transmitting Item 111. Letter does not discuss any content of Item 111.	N.R.

4/ See affidavit of NLRB attorney Amy Gladstein dated December , 1975, Exhibit , to NLRB's Motion for Dismiss or in the alternative for summary judgment of defendant's counterclaims.

	DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
111.	Statement of events regarding election objections in Case No. 2-RC-16670 enclosed with Item 110 above.	7(D)
112.	Letter to Region 2, NLRB dated December 17, 1974 from Local 1783, IBEW counsel submitting unfair labor practice charges.	N.R.
113.	Objections to Election filed in Case No. 2-RC-16670 on December 17, 1974 by Local 1783, IBEW counsel.	N.W.
114.	Same as Item 113 above.	N.W.
115.	Letter to Region 2, NLRB dated December 30, 1974 advising N.L.R.B. that undersigned was counsel for Company.	N.W.
116.	Letter to Company from Regional Director, Region 2, NLRB dated December 19, 1974 informing Company of charges filed, serving Company with copy of charges and requesting an answer thereto.	N.W.
117.	Letter to Local 1783, IBEW from Regional Director, Region 2, N.L.R.B. acknowledging receipt of charges.	N.R.
118.	Same as Item 8 above.	N.W.
119.	Same as Item 8 above.	N.W.
120.	Service Sheet: typewritten list of names and addresses of: Company, Company's counsel, Charging Party, Charging Party's counsel.	N.R.
121.	Table of Contents of portion of file: lists among other things names of several of informants in case.	5, 7(D)
122.	Handwritten minutes of Regional Office Meeting, March 11, 1975 (12 pp.) summarizing information gathered in investigation; disclosing names and personal information of several informants who were promised confidentiality; discussing strengths and weaknesses of case and application of Region's legal theories to facts.	5, 7(C), (D)

DESCRIPTION OF ITEM		EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
123.	Letter to Region 2, NLRB from Local 1783, IBEW dated April 2, 1975 submitting enclosed evidence in case.	N.R.
124.	NLRB attorney's (hereafter "attorney's") handwritten notes (2 pp.) dated March 27, 1975 summarizing conversation with informants; discloses names and personal information of informants promised confidentiality by NLRB attorney.	5, 7(C), (D)
125.	Affidavit (9 pp.) signed, handwritten taken by NLRB attorney subjects: names; address; relationship with parties to Board proceeding; and knowledge concerning unfair labor practice allegations; discloses names of affiant and other informants promised confidentiality.	5, 7(C), (D)
126.	Attorney's handwritten memorandum to file disclosing names and telephone numbers of informants, some of whom were promised confidentiality.	5, 7(C), (D)
127.	Intra-office memorandum handwritten between NLRB agents regarding withdrawal of portion of unfair labor practice charges.	5
128.	Memorandum to General Counsel from Region 2, NLRB reporting issuance of complaint in Case No. 2-CA-13562 and explaining reasons therefore; handwritten draft prepared by NLRB attorney: summarizes facts gained during investigation and applies Region's legal analysis to the facts.	5, 7(D)
129.	Attorney's handwritten notes dated March 24, 1975 summarizing Settlement discussion with Company's counsel (1 p.).	5
130.	Attorney's handwritten memorandum to file date March 10, 1975, summarizing tactical problems in investigation; discloses names and personal information of several informants promised confidentiality (4 pp.).	5, 7(C), (D)

	DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, ADDITION TO 7(A)
131.	Agent's handwritten note to file (1 p.) as reminder to discuss investigation strategy with other Board agent; discloses names and personal information of informant promised confidentiality.	5, 7(C), (D)
132.	Handwritten intra-office memorandum between agents dated March 4, 1975 analyzing information obtained from informant.	5
133.	Handwritten intra-office memorandum between NLRB agents dated March 6, 1975; relates litigation strategy and personal information obtained by agent from informant who was promised confidentiality (1 p.).	5, 7(C), (D)
134.	Attorney's handwritten note to file (1 p.) summarizing personal information regarding informant promised confidentiality.	5, 7(C), (D)
135.	Attorney's handwritten note to file dated March 10, 1975 listing questions to ask witness; discloses names of witnesses promised confidentiality and telephone number of witness (1 p.).	5, 7(C), (D)
136.	Attorney's handwritten summary of information obtained during conversation with informant; discloses names and personal information of witnesses promised confidentiality (1 p.).	5, 7(C), (D), (E)
137.	Attorney's handwritten questions prepared to ask informant (1 p.).	5
138.	Attorney's handwritten questions prepared to ask informants; discloses names of informants promised confidentiality (1 p.).	5, 7(D)
139.	Attorney's handwritten questions prepared to ask witness (1 p.).	5
140.	Attorney's handwritten memorandum to file summarizing personal information obtained from informant who was promised confidentiality, dated March 12, 1975 (1 p.).	5, 7(C), (D)

	DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
141.	Letter to potential witness from NLRB attorney dated March 10, 1975, seeking interview, addressee was subsequently promised confidentiality at resulting interview.	5, 7(D)
142.	Attorney's handwritten directions to homes of informants.	N.R.
143.	Attorney's handwritten memorandum to file dated March 18, 1975 summarizing attorney's views on impact and truthfulness of particular informant; discloses name of informant promised confidentiality (1 p.).	5, 7(C), (D)
144.	Affidavit (7 pp.) signed, handwritten, taken by NLRB attorney March 17, 1975 from witness promised confidentiality; subject: Name, address, telephone number and relationship with parties to NLRB proceeding and knowledge of unfair labor practices; discloses names of other informants.	5, 7(C), (D)
145.	Attorney's handwritten memorandum to file dated March 18, 1975 summarizing attorney's views of impact of particular witness' testimony; discloses name and personal information of witness promised confidentiality (1 p.).	5, 7(C), (D)
146.	Attorney's handwritten memorandum to file dated March 11, 1975, summarizing conversation of that date with informants; discloses name of informant promised confidentiality and personal information.	5, 7(C), (D)
147.	Affidavit (5 pp.) unsigned, handwritten, prepared by NLRB attorney; subject: name, address, phone number, relationship with parties to NLRB proceeding, and summary of knowledge of unfair labor practice; discloses name of affiant and other informants promised confidentiality.	5, 7(C), (D)
148.	Attorney's handwritten questions prepared to ask witness; discloses name of and personal information informants of promised confidentiality (1 p.).	5, 7(C), (D)

	DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
149.	Attorney's handwritten notes dated March 6, 1975, summarizing information obtained in interview with witness; discloses names and personal information of informants, one of whom was promised confidentiality (4 pp.).	5, 7(C), (D)
150.	Affidavit (14 pp.) unsigned, prepared by NLRB attorney; Subject: affiant's relationship to parties in Board proceeding and knowledge concerning unfair labor practice; discloses names and personal information of informants, some of whom were promised confidentiality and personal information about them.	5, 7(C), (D)
151.	Letter to NLRB attorney dated March 21, 1975 from Company's counsel submitting affidavit.	N.W.
152.	Affidavit (pp.) typed; of Joseph Silvestro taken March 20, 1975 subject: duties of employees of defendant.	N.W.
153.	Letter, dated December 9, 1974 to Company's employees from Company example of pre-election campaign conduct.	N.W.
154.	Notice posted before election, defaced by unknown persons.	N.W.
155.	Attorney's handwritten questions (2 pp.) prepared in anticipation of interviewing several informants, discloses names of informants promised confidentiality.	5, 7(D)
156.	Attorney's handwritten notes (11 pp.) summarizing information obtained in interview with several informants; subject: informants relationship with parties in Board proceedings and information pertaining to unfair labor practice allegations; discloses names and personal information of informants promised confidentiality.	5, 7(C), (D)
157.	NLRB agent's handwritten questions prepared, and summary of answers obtained in interview with informant; discloses names and personal information of informants who were promised confidentiality (2 pp.).	5, 7(C), (D)

DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
158. Intra-office memorandum; handwritten (4 pp.) dated March 3, 1975 from NLRB attorney to NLRB agent summarizing background of case, one informant's involvement in case and list of topics informant should be asked in interview; discloses names of informants who were promised confidentiality.	5, 7(C), (D)
159. Affidavit (11 pp.); dated March 3, 1975, handwritten, signed, taken by NLRB agent subject: name; address; relationship with parties in Board litigation and information regarding alleged unfair labor practices; discloses names and personal information of informants who were promised confidentiality.	5, 7(C), (D)
160. Affidavit (15 pp.) dated January 6, 1975, handwritten, signed, taken by NLRB attorney; Subjects: name; address; phone number; relationship with parties in Board litigation and information regarding alleged unfair labor practices; discloses names of informants who were promised confidentiality.	5, 7(C), (D)
161. Attorney's handwritten notes (2 pp.) dated March 12, 1975 listing questions to ask and summarizing answers received from informant during interview. Discloses names and personal information of informants, one of whom was promised confidentiality.	5, 7(C), (D)
162. Affidavit (7 pp.) dated January 6, 1975 handwritten; signed, taken by NLRB attorney; Subject: name; address; phone number; relationship with parties in Board litigation and information pertaining to alleged unfair labor practices; discloses names of this and other informants; some of whom were promised confidentiality.	5, 7(C), (D)
163. Letter dated November 29, 1974, from Company; example of Company's pre-election campaign conduct; discloses name of person who supplied copy of letter.	7(D)

	DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
164.	Letter dated December 2, 1974 from Company; example of Company's pre-election campaign conduct; discloses name of person who supplied copy of letter.	7(D)
165.	Letter dated December 6, 1974, from Company; example of defendant's pre-election campaign conduct; discloses name of person who supplied copy of letter.	7(D)
166.	Exerpt from U.S. News and World Report, January 19, 1970; attachment to Item 165 above.	N.R.
167.	Same as Item 11 above.	N.W.
168.	Same as Item 12 above.	N.W.
169.	Letter dated November 4, 1974 from Local 1783, IBEW, example of union's pre-election campaign conduct.	7(A) only
170.	Letter dated November 18, 1974 from Local 1783, IBEW; announces pre-election union meeting.	7(A) only
171.	Letter dated December 6, 1974 from Local 1783, IBEW, example of union's pre-election campaign conduct.	7(A) only
172.	Blank NLRB form for summarizing settlement efforts.	N.R.

SUPPLEMENTAL LIST OF ITEMS
CONTAINED IN INVESTIGATORY FILE
IN BOARD CASE NO. 2-CA-13562

These new items do not pertain to investigation of unfair labor practice case. However, for your information they are as follows:

	DESCRIPTION OF ITEM	EXEMPTIONS CLAIMED, IF ANY, IN ADDITION TO 7(A)
173.	Memorandum dated January 8, 1976 to attorney in Washington requesting copies of file of this case (1 p.).	N.R.
174.	Draft of original list of items in case file of this instant case (15 pp.).	N.R.
175.	Draft of letter to Judge Metzna to request that he take these matters for all purposes.	N.W.
176.	Letter dated January 5, 1976 to NLRB attorney from Company's attorney submitting papers Company intended to file in Court.	N.W.
177.	Memorandum to attorney in Region from attorney in Washington recommending submission of letter to Court in instant case requesting oral argument.	N.R.
178.	Notice of Motion in instant case.	N.W.
179.	Copy of letter sent to J. Gagliardi in Title Guarantee requesting oral argument.	N.R.
180.	Memorandum dated December 11, 1975 submitting to Region 2 from Washington drafts of memorandum in instant case.	N.R.
181.	October 15, 1975 letter from Company counsel to Board submitting papers Company intended to submit to Court in instant case.	N.W.
182.	Letter to Company counsel from the Board submitting documents that the Board intended to file in instant case.	N.R.

EXHIBIT B

N.L.R.B. v. Biophysics, Inc.
M-18-304

SUPPLEMENT TO INDEX OF EXHIBITS SUBMITTED
TO THE COURT FOR IN CAMERA INSPECTION

All union authorization cards signed by employees of Biophysics Systems, Inc., which designate Local 1783, I.B.E.W. as their bargaining representative. These cards were submitted to Region 2 of the National Labor Relations Board in Case No. 2-RC-16670 entitled Biophysics Systems, Inc..

The Board asserts that these union authorization cards are exempt from disclosure under exemptions 7(A), (C), and (D) of the Freedom of Information Act, (5 U.S.C. Sec 522(b) (7)(A)(C)(D)).

EXHIBIT C

N.L.R.B. v. Biophysics, Inc.
M-18-304

SUPPLEMENT TO INDEX OF EXHIBITS SUBMITTED
TO THE COURT FOR IN CAMERA INSPECTION

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The Board asserts that these union authorization cards are exempt from disclosure under exemptions 7(A), (C), and (D) of the Freedom of Information Act, (5 U.S.C. Sec 522(b) (7)(A)(C)(D)).

EXHIBIT C

Received 6/11/76 SF
Received
Entered in Docket 6/11/76 SF
Entered in Diary For

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD,

Applicant,

-against-

BIOPHYSICS SYSTEMS, INC.,

Respondent,

and

BIOPHYSICS SYSTEMS, INC.,

Respondent,

-against-

JOHN S. IRVING, General Counsel of the National Labor Relations Board, and SIDNEY DANIELSON, Regional Director of the National Labor Relations Board, Region 2,

Additional Defendants on the Counterclaims.

76 M18-304

NOTICE OF APPEAL

Notice is hereby given that Respondent Biophysics Systems, Inc. hereby appeals to the United States Court of Appeals for the Second Circuit from the order dated April 12, 1976 and entered in this action on April 12, 1976 granting Applicant's motion for summary judgment, dismissing Respondent's counterclaims, and denying Respondent's motion for a preliminary injunction.

Dated: New York, New York
June 11, 1976

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

By Saul G. Kramer
Saul G. Kramer

TO:

William Wachter, Acting Assistant
General Counsel for Special Litigation
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Edward H. Bennett, Regional Attorney
Region 2, N.L.R.B.
36th Floor - Federal Building
26 Federal Plaza
New York, New York 10007

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 76 M18-304

NATIONAL LABOR RELATIONS BOARD,

Applicant,

against

BIOPHYSICS SYSTEMS, INC.,

Respondent.

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned, attorney at law of the State of New York affirms: that deponent is associated with the firm Proskauer Rose Goetz & Mendelsohn *attorney(s) of record for* Respondent

That on June 11, *19* 76 *deponent served the annexed* Notice of Appeal

on William Wachter, Esq.
attorney(s) for Applicant
in this action at 1717 Pennsylvania Ave., N.W., Washington, D.C. 20570
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated June 11, 1976

Jonathan L. Sulds

The name signed must be printed beneath

Jonathan L. Sulds

Attorney at Law

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Ann H. Lister being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age and reside at 27 Washington Square North, New York, N.Y. 10011

On September 2, 1976, I served the attached Brief of Appellant (2) and Appendix upon the following attorney(s) at the address designated by him (them) for that purpose:

Abigail Cooley
Assistant General Counsel For Special Litigation
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Edward H. Bennett, Regional Attorney
Region 2, NLRB, 36th Fl., Federal Building, 26 Federal Plaza
New York, N.Y. 10007

Said service was made by depositing a true copy of the attached Appendix and Brief of Appellant(2) enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Ann H. Lister

Ann H. Lister

Sworn to before me this
2nd
day of September, 1976.

Vitold J. de Stronie
Notary Public

VITOLD J. de STRONIE
Notary Public, State of New York
No. 41-4517529
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1977

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